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No. _____

In the

Supreme Court of the United States

October Term, 1996

Patrick Rosenstiel and Christopher Longley,

Petitioners,

vs.

Carolyn Rodriguez, in capacity as Chair of the Ethical Practices Board, or her successor,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the majority of the Eighth Circuit panel below was correct in concluding that the challenged statutory scheme imposed no regulatory burden and that the system therefore was subject to no scrutiny under the First Amendment.

2. Whether the majority was correct in concluding that, even if strict scrutiny were required, the system passed that test, because it was narrowly tailored to serve a compelling interest.

3. Whether the majority was correct in stating that there was no constitutional basis for challenging regulations that protect incumbent officeholders from electoral challenge, but that even if there were, no such difficulties were present here.

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Patrick Rosenstiel and Christopher Longley Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 101 F.3d 1544 and is set forth in Petitioners' Appendix. (App. 1–45.) The March 21, 1995, Memorandum Opinion and Order of the United States District Court for the District of Minnesota, striking down one section of the challenged statutes and upholding three other sections of Minnesota's campaign finance statutes, is not reported and is set forth in Petitioners' Appendix. (App. 46-65.) The September 30, 1994, Memorandum Opinion and Order of the United States District Court for the District of Minnesota, denying Petitioners' Motion for a Preliminary Injunction, is not reported and is set forth in Petitioners' Appendix. (App. 66-85.)

JURISDICTION

On December 11, 1996, the Eighth Circuit entered judgment by a divided vote. This Petition was filed within 90 days after entry of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. amend. I

Amendment I to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. **Minn. Stat. § 10A.25 (as amended by Laws 1996, c. 459, § 2, eff. April 12, 1996) (App. 86).**

3. **Minn. Stat. § 10A.25, subd. 10 (prior to amendment by Laws 1996, c. 459, § 2, eff. April 12, 1996) (App. 88).**

4. **Minn. Stat. § 10A.322, Subd. 4 (App. 89).**

5. **Minn. Stat. § 290.06. Subd. 23 (App. 90).**

6. **Minn. Stat. § 10A.27 (App. 90).**

STATEMENT OF THE CASE

Petitioners filed their Complaint in this matter on August 19, 1994. On the same day they filed their Motion for a Preliminary Injunction, together with supporting affidavits and their Memorandum in Support of Motion for a Preliminary Injunction. Jurisdiction was proper under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

Petitioners have always made two central arguments in support of their contention that the challenged sections of Minnesota's campaign finance laws violate the First

Amendment. Petitioners maintain that Minnesota's system of campaign finance regulation threatens any candidate who refuses to limit his campaign spending with such severe competitive penalties that the state's spending limits are effectively commanded by the sovereign. Petitioners have also argued that the system violates the strict neutrality required of states when regulating political expression because the system unconstitutionally favors entrenched incumbent officeholders over their actual and potential political challengers. This Court has consistently applied strict scrutiny to campaign finance regulations, and squarely prohibited mandatory spending limits under that standard. *Buckley v. Valeo*, 424 U.S. 1, 57 & n.65 (1976).

A divided panel of the Eighth Circuit Court of Appeals below denied petitioners' claims. First, the majority held that the challenged statutory scheme imposed no regulatory burden at all, and that the system merited no scrutiny whatever under the First Amendment. Second, the majority found that even if strict scrutiny were required, the system passed that test. The state scheme was narrowly tailored to serve the compelling interest in prohibiting political corruption. Finally, the majority doubted whether protecting incumbent officeholders from effective electoral challenge presented any constitutional difficulties. But even if it did, no such difficulties were present here.

The Minnesota legislature extensively amended its campaign finance system in 1993, and petitioners challenged the cumulative effect of those statutes in their complaint in this matter in 1994. The petitioners initially challenged the cumulative effect of four features of the campaign regulatory system created by the 1993 amendments, together with previous provisions. The challenged system provided that where a major-party candidate signed an agreement to limit spending and accept public funds, but his major party opponent did not, the following occurred. First, the publicly-

funded candidate was allowed to keep the public money given in return for the limit agreement. Second, the publicly-financed candidate was nevertheless freed from the limits, and allowed to raise and spend without limitation. Third, the 1993 amendments transferred the public funds allotted to the privately financed candidate to his or her publicly funded opponent (the "opponent's share" provision). And finally, the state repayed the first $50 to $100 of contributions to the contributors of only publicly funded candidates (the tax refund provision).

Petitioners argued that this system, as a practical matter, forced any serious candidate to "agree" to spending limits. This was because the competitive disadvantages the system imposed for refusing were in most races insurmountable. The system had this effect across the board, but it was particularly overwhelming where a little-known challenger such as petitioner Rosenstiel contemplated a race against a long-time and entrenched incumbent. In races like that, the system protected incumbents by presenting challengers with essentially two choices. First, challengers could "agree" to limit their spending, and thus their political voice, to the muted level approved by the legislature. This level was too low to allow a genuinely competitive campaign, but the challenger's campaign would be allowed to die with dignity. If the challenger in this situation refused to agree to the limit, however, his electoral defeat would be far noisier. In that case the State of Minnesota itself would rally to the incumbent's cause, and would join the incumbent's supporters in drowning the challenger beneath an enormous wave of public and private spending. Petitioners hardly needed to add that incumbent legislators pass campaign regulations, and that the intimidation and deterrence of effective electoral challenge is neither an unforeseen nor an unintended consequence of them.

In its response to petitioner's prayer for a preliminary injunction, the district court stated that both the tax-refund

and the "opponent's share" features of the law were probably unconstitutional. See App. 74-76. In its final order, the district court held that only the "opponent's share" provision violated the First Amendment, and it permanently enjoined that provision. See App. 65. The court upheld the remainder of the challenged statutes, and petitioners appealed to the Court of Appeals for the Eighth Circuit on April 4, 1995. Oral argument was held in August of 1995, and the legislature amended the campaign finance laws again in 1996. This litigation was still pending in the Eighth Circuit, and the court asked the parties for letter briefs on the effect of the 1996 amendments. The 1996 amendments deleted the "opponent's share" provision which the district court had enjoined, but the legislature at the same time expanded the coverage of the rest of the scheme beyond major party candidates to all candidates. As petitioners pointed out, the former Speaker of the House of Representatives, Dee Long, had found herself faced by the only challenger in the state who had refused to agree to spending limits in order to mount a well-funded, private campaign. One such dissenter, it seemed, was more than enough for the former Speaker, at least where that one had opposed her. The former Speaker therefore sought and obtained passage of a provision extending the system to all candidates, not just those endorsed by a major party. This would ensure that nothing of this sort would happen again.

The Eighth Circuit's opinion came down on December 11, 1996. *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). App. 1. The majority and the dissent disagreed about virtually everything in the case. The most surprising conclusion of the two-judge majority was that, instead of invoking strict scrutiny under the First Amendment, the challenged regulations in fact invoked no scrutiny at all. This was because, properly speaking, the challenged campaign finance regulations actually imposed no regulation whatever. The majority reasoned that because these regulations were not

"inherently penal," they were not unconstitutionally coercive. *Rosenstiel*, 101 F.3d at 1550. App. 12. And because they were not unconstitutionally coercive, it followed that the regulation imposed no burden on expressive rights at all. *Id.* at 1550, 1552-53. App. 12, 16-17. Former Chief Judge Lay in dissent labelled this analysis "meaningless rhetoric." *Rosenstiel*, 101 F.3d at 1561 n.20 (Lay, J. dissenting). App. 35 n.20.

The majority had a fall-back position, however, on this score. The majority found that if any scrutiny was required, it was strict scrutiny. The statutes at issue passed this test, because they were narrowly tailored to serve a compelling interest. *Rosenstiel*, 101 F.3d at 1553-54. App. 17. Chief Lay, dissenting, thought that the state's interest in encouraging spending limits had been fully served without the added coercion of these statutes, as participation has nearly always topped 90 percent. *Rosenstiel*, 101 F.3d at 1564. App. 42-43. He also noted that the State cannot create its own problem by imposing unrealistically low spending limits and then impose ever broader and more coercive speech restrictions in pursuit of perfect compliance. The constitutional solution to excessive privately financed speech is more speech, through higher spending limits, greater subsidies or both. *Id.*

REASONS FOR GRANTING THE WRIT

Judge (and former Chief) Donald Lay correctly noted in his dissent below that the majority's analysis represents the "avoid[ance]", and perhaps the overthrow, of "the fundamental principles of *Buckley [v. Valeo]*, 424 U.S. 1 (1976)]. . . ." *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1563 ((8th Cir. 1996) (Lay, J., dissenting). App. 39. The only arguable effect of the 1996 amendment broadening the coverage of the statutes was to make their coercive effect *worse*. Before the change, candidates at least had the option of declining major party endorsement and running a privately funded campaign as an independent. The 1996 amendments removed even that choice, and applied the statutory coercion to all serious candidates for office. The statute automatically frees the publicly financed candidates from the very low spending limits the instant any opponent raises enough campaign funding to mount a credible campaign. The amendment does this by "waiving" the limits whenever any opponent raises a mere twenty percent of these low limits prior to the primary, or fifty percent thereafter. *Rosenstiel*, 101 F.3d at 1562 n. 25. App. 37.

As Chief Lay correctly notes, the coercive impact results directly from the fact that the spending limits ($21,526 for a legislative race for representative) are too low to mount a credible campaign against an entrenched legislative incumbent. *Id.* at 1562 n. 25. App. 37. When one makes the "choice" between foregoing a competitive campaign and abiding by the limits, one has not freely chosen but has acceded to a threat.

Plaintiffs initially challenged the cumulative effect of four specific features of Minnesota's system of campaign finance regulation. Three of the four burdens or penalties for refusal are still part of the law. First, the non-signing candidate's opponent is allowed to keep the public financing, and second, that opponent is nevertheless freed from the spending limits.

Third, the publicly-financed candidate who accepted the limits is allowed, and his or her opponent is denied, the right to refund $50 to $100 of his contributors' funds directly from state coffers. And finally, under the bill challenged below, a candidate who agreed to limits was given his or her non-signing opponent's share of the public finance money allotted to that race. Although Judge Kyle initially stated in his Order denying plaintiffs' motion for a preliminary injunction that both of the last two innovations were probably unconstitutional, in his final Order he permanently enjoined only the last. *See generally App. 74-76.* The State did not challenge this ruling. These features are codified at Minn. Stat. §10A.25, subd.'s (b)(i), (b) (ii), and (b) (iii) ("Effect of Opponent's Agreement" to limit spending), as well as at §10A.322, subd. 4, and Minn. Stat. §290.06, subd. 23 ($50-$100 tax rebates to citizens for contributing to candidates who have agreed to limit spending). App. 86-91.

Plaintiffs argued that these features, taken together, made refusal to limit campaign spending as the legislature wished so unattractive that the system effectively imposed mandatory rather than "voluntary" spending limits. Although the State is permitted to make a candidate's voluntary agreement to limit spending a condition of his acceptance of public campaign funds, this Court has always held that the First Amendment prohibits *mandatory* spending limits. *Buckley v. Valeo*, 424 U.S. 1, 57 n. 65 (1976). It has been more recently suggested, in an ignored passage from a case relied on by the majority below, that legislative efforts to compel or "encourage" candidates to limit spending are only constitutional where: (1) "the choice between the packages [of burdens and benefit] is real, *uncoerced*, and available to all"; (2) where "there is no credible evidence of a *penalizing purpose*"; and where (3) the choice does not "*unjustifiably burden* first amendment rights." *See Vote Choice v. DiStefano*, 4 F.3d 26, 40 (1st Cir. 1993) (emphasis added).

The incumbents who pass campaign finance laws are engaged in *regulating their own hold on power*. Incumbents know that low coercively-imposed spending limits at roughly equal levels impose much greater competitive burdens on challengers than on well-known incumbents. *Service Employees Union v. California Fair Political Practices Committee*, 955 F.2d 1312 (9th Cir. 1992) (striking down such regulation as violative of the First Amendment's requirement of government neutrality in any regulation of political speech). Indeed, for candidates such as plaintiff Rosenstiel, who contemplated a challenge to a twenty-two year incumbent legislator, the coercive threats of the Minnesota regime presented him with the choice of accepting spending limits that were too low to mount an effective campaign, or violating the limits and freeing the entrenched, powerful incumbent to bury him under a mountain of public and private spending. Petitioners suggested that challengers to entrenched legislative incumbents in Minnesota face a choice between a quiet death and a noisy one.

Petitioners' argument on these points went to the second and third questions asked by the First Circuit Court in *Vote Choice*: the legislation imposes *burdens* on expression that are not justified by the stated goals, but are instead actually motivated by the "*penalizing purpose*" of discouraging and punishing challengers. *See Vote Choice v. DiStefano*, 4 F.3d at 40. The ever-expanding regime of coercive penalties for exceeding spending limits has not been created because the legislature thought that participation rates over 95% were too low. It has instead been created and expanded to intimidate potential challengers to entrenched incumbents and to make the reelection of incumbents, especially leading Democratic incumbents, ever easier and more trouble-free.

Petitioners argued in the district court that the State was not, in fact, seeking to raise participation rates, because those rates were already at, or very near, 100%. Petitioners' counsel

argued below: "[t]he only person in the state, therefore, who refused to sign a public subsidy agreement, who was otherwise under the encouragement of the state to do so, because that candidate wanted to blow the spending limits . . . was probably one candidate, maybe in the whole state, Bets[e]y Whitbeck, and of course she was resoundingly defeated." Transcript of Hearing conducted January 11, 1995, at 19. Plaintiffs also mentioned the fact that Whitbeck was the only candidate who had refused to abide by a spending limit that otherwise would have applied to her candidacy. Petitioners noted that Whitbeck's sound defeat tended to support the view of most that "[m]oney does not buy elections, it buys only an opportunity to be heard." *Id.* Even this, however, was apparently too much for Whitbeck's opponent.

This brings us to the amendment passed in 1996. Betsey Whitbeck ran an independent campaign against powerful DFL Representative Dee Long of Minneapolis, the recently-retired Speaker of the Minnesota House of Representatives. Despite the fact that former-Speaker Long had decisively beaten Whitbeck (about 52 to 43 percent) in the general election, Speaker Long apparently felt that this challenge had nevertheless posed a serious threat to the public interest. On March 9, 1995, therefore, she argued for adoption of House File No. 667, which became the 1996 amendment, and which for convenience Petitioners referred to as the "Betsey Whitbeck Amendment." Former-Speaker Long explained the legislative intent behind the amendment:

> Thank your Mr. Chairman, Members. House File 667 is a response to a rather *personally experienced* [inaudible: and?] totally unintended consequence of the Campaign Finance Bill. The specific language was passed with that bill. I was a conferee and I remember some of the discussion. And it was the situation where if an individual does not sign the

> agreement and abide by the spending limits their opponent is uncapped and is able to tap into the public finance dollars available to that individual. The discussion in the conference committee, as I recall very late one night, had to do with *whether in the case of independent candidates, it would be necessary to impose this*, and the thought, the consensus actually, among the ten conferees seemed to be that these *independent candidates don't have any money anyway, and they won't be spending anything and it is not a concern*. Ah, I was rather surprised that more people did not discover and use the loophole in the following [1994] election. Ah, but, I had an opponent who inquired of ethical practices, if that individual were to run as an independent, would I [Long] be uncapped in terms of the spending limit, ah, and I would then get their public finance dollars which were fairly minimal given that they [Whitbeck] were not running as a party person. Ah, the answer was no, because of the major party clause. And so that individual was able to spend about 50,000 dollars.
>
> I don't think that was the intent, in fact I know it was not the intent of the legislation, certainly in terms of the conferees who put it together. And so the effect the language before you [the original draft of the 1996 amendment] is to apply this to everyone who appears to be a serious candidate.

Minnesota House of Representatives, General Legislation and Veteran's Affairs Committee, Elections Division, conducted March 9, 1995 (emphasis added) (Taped proceedings reviewed by undersigned on June 11-12, 1996: *see* Affidavit of

Harlan Goulett, attached to Appellant's Letter Brief below, dated June 13, 1996, Exhibit D).

Petitioners submit that passage of the Betsey Whitbeck Amendment proves two crucial points. First, the campaign finance regime challenged here imposes "unjustified burdens" on free political activity, because the penalties of the law cannot be legitimately justified in terms of the publicly stated goals of simply "increasing participation" in the system. *See Rosenstiel v. Rodriguez*, 101 F.3d at 1564 (Lay, J. dissenting), App. 42, and citing *Day v. Holahan*, 34 F.3d 1356, 1361-62 (8th Cir. 1994) cert. denied, ___ U.S. ___, 115 S.Ct. 936 (1995) (so holding). A public financing and spending limit system which employs ever-expanding power in pursuit of one-hundred percent compliance, a system that cannot tolerate a *single dissenter*, is simply no longer the "voluntary" system the Constitution commands. *Cf. Buckley v. Valeo*, 424 U.S. 1, 57 & n.65 (1976). And the Whitbeck Amendment also proves a related point: the real purpose of this legislation in Minnesota in general, and of the Whitbeck Amendment in particular, is *punitive*. Legislators and other elected officials do not enjoy electoral challenge, and the more credible the challenge the less they like it. The Whitbeck Amendment was passed because a powerful legislator of the majority party found that serious challenges to her power continued to be *possible* under the law. The amendment was expressly passed to "solve" that "problem." The goal of punishing and deterring electoral challenges to entrenched political officeholders is the constantly feared and quintessentially illegitimate goal of power under the First Amendment. This is because "[a]ll government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). The challenged statutes here enact a coercive regime to that end, one that should be stricken down in its entirety.

A. The Eighth Circuit's Holding that Campaign Finance Regulations That Fall Short of Unconstitutional Coercion Or Are Not "Inherently Penal" Are Subject to *No First Amendment Scrutiny Whatever* is Flatly Inconsistent With This Court's Doctrine of Unconstitutional Conditions.

The Eighth Circuit panel majority entirely ignored the petitioners' argument that the regulatory scheme imposed unconstitutional conditions on their right of free political expression. This Court has repeatedly held that, just as government may not directly forbid the exercise of a right, so it may not achieve the same result by penalizing its exercise. Government may freely grant benefits, and may generally place relevant and proper conditions on the receipt of those benefits. But government may not use its power over benefits to selectively penalize the exercise of constitutional rights. *See Board of Commissioners of Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S.Ct. 2342, 2347, 2350 (1996) (independent contractor under mere at-will contract nevertheless may not be terminated for expressing political opinions). Constitutional rights are, after all, nothing more than legal protections granted to aspects of the citizen's liberty or free choice. Those rights remain insecure if they are protected only against government's power to impose "direct prohibition[s]" on their exercise. *Id.* at 2347. Government could achieve the same result indirectly by using other powers, which modern government possesses in great abundance, to simply discourage or penalize the exercise of those rights. This is why this Court and other constitutional courts have long held that government may not circumvent constitutional limitations by conditioning benefits or other advantages on the citizen's "waiver" of his rights.

Recognizing that "constitutional violations may arise from the deterrent, or 'chilling'," effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum*, 408 U.S. 1, 11 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to [or impose a burden on] a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit. . . . *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

. . .

Our unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions (*Speiser v. Randall*, 357 U.S. 513 (1958)), users of public facilities (*e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, --- - ---, 113 S.Ct. 2141, --- - ---, 124 L.Ed.2d 352 (1993); *Healy v. James*, 408 U.S. 169 (1972)), and recipients of small government subsidies (e.g. *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing. The First Amendment permits neither the firing of janitors nor the discriminatory pricing of state lottery tickets based on the government's disagreement with certain political expression.

Board of Commissioners of Wabaunsee County v. Umbehr, ___ U.S. ___, 116 S.Ct. 2342, 2347, 2350 (1996).

The content of the constitutional right in question, of course, goes far toward determining the scope and strictness of this doctrine of "unconstitutional conditions." In enforcing free speech, this Court recognizes that "[a]ll government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). The Court has therefore long been particularly suspicious of government's use of *any* of its powers, whether over "carrots" or "sticks," to achieve that result. The Court has very generally refused to allow government to *penalize* the citizen for exercising free speech rights, or to condition important advantages or benefits on his "waiver" of them. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (government could not condition subsidy to public television stations on their waiver of all right to engage in political editorializing); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (government may not discharge employee for engaging in protected expression); *Keysihian v. Board of Regents*, 385 U.S. 589 (1967) (same); *cf. also Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (commerce power).

Thus, the fact that the victim of a threat has acceded to it and "waived" his right cannot itself show that his choice was free. "[I]t is always in the interest of a party under duress to choose the lesser of two evils." *Union Pac. R.R. v. Public Service Comm'n*, 248 U.S. 67, 70 (1918) (Holmes, J.). Government simply may not present the individual with "the choice between the rock and the whirlpool. . . ." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926).

This Court in this century has, of course, shown particular solicitude for the right of free speech. *See, e.g.*, John E.

Nowak & Ronald D. Rotunda, *Constitutional Law* 941-42 (4th ed. 1991), citing *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (First Amendment rights are "in a preferred position"). The courts have regularly recognized that free speech is a peculiarly fragile right. Statutes may be unconstitutional simply for merely deterring or "chilling" the exercise of speech rights. And such deterrence may result from a wide variety of laws and regulations. *See, e.g., Board of Commissioners of Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S.Ct. 2342, 2350 (1996), citing, inter alia, *Speiser v. Randall*, 357 U.S. 513 (1958).

The substantive principles of the First Amendment demand that government attempts to regulate *political* speech be viewed with special suspicion. This Court regularly has emphasized that the First Amendment "'has its fullest and most urgent application to the conduct of campaigns for political office.'" *McIntyre v. Ohio Elections Comm'n*, ___ U.S. ___, 115 S.Ct. 1511, 1518 (1995) (requirement that pamphleteer disclose name on pamphlet violated First Amendment), quoting, inter alia, *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). This Court has made it clear that the prohibition on government coercion or penalties for the exercise of rights has particularly strict application to the protection of free political speech. It must be recalled that unconstitutional conditions problems cannot be analyzed in the abstract. The constitutionality of any such device must be analyzed in terms of the substantive principles underlying the constitutional limitation in question. *See, e.g.*, Nowak & Rotunda, *supra* at 955 & n.11.

The reason the Court reviews conditions on the exercise of First Amendment free speech rights so strictly is therefore clear. This is because the First Amendment forbids government to use *any* of its powers to accomplish indirectly what it is forbidden to seek directly, namely, to achieve "'control [over] the search for political truth.'" *FCC v. League*

of Women Voters, 468 U.S. 364, 384 (1984), quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 538 (1980). No soverign power of any kind may be employed to achieve that forbidden goal. As this Court recently put it,

> The First Amendment permits neither the firing of janitors nor the discriminatory pricing of state lottery tickets based on the government's disagreement with certain political expression.

Board of Commissioners of Wabaunsee County v. Umbehr, ___ U.S. ___, 116 S.Ct. at 2350 (1996).

The *Wabaunsee County* case also re-affirmed the relationship between unconstitutional conditions and strict scrutiny. The strict scrutiny standard is invoked by *any* use of soverign power which in any way "burdens" or regulates freedom of political speech. As this Court has regularly made clear, "[w]hen a law *burdens* core political speech, . . . we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *See McIntyre v. Ohio Elections Comm'n*, ___ U.S. ___, 115 S.Ct. 1511, 1519 (1995); *see also Board of Commissioners of Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S.Ct. at 2350 (1996) (strict scrutiny must apply whenever the state uses "sovereign power," as opposed to employer's or contractor's power, against the citizen to penalize him for political expression).

The Eighth Circuit majority clearly recognized that any *burden* on political expression must survive strict scrutiny. In order to "avoid" this Court's precedent, the majority struggled to find that this law in fact imposed no regulatory "burden" on expression *at all*. Petitioners can do no better than to quote the panel majority's rationale on this subject. The panel first re-interpreted the challenged law's penalties in the neutral language of "incentives." This gives a different impression

without actually denying the obvious. Then the majority simply asserts that "these inducements . . . do not *per se* render the State's scheme coercive because they are not inherently penal." *Rosenstiel v. Rodriguez*, 101 F.3d at 1550. App. 12. This, such as it is, constitutes the majority's explanation of its holding that the "incentive" structure imposed by these laws were subject *no constitutional scrutiny at all*.

Former Chief Lay in dissent noted that this is "meaningless rhetoric." *Rosenstiel v. Rodriguez*, 101 F.3d at 1561 n. 20. App. 35 n.20. He is clearly correct. The choice faced by challengers in Minnesota, to sign on to very low spending limits or be buried by the public and private spending of their opponents, cannot possibly be analogized to a pure "offer" of a benefit with no stings attached.

The cases holding that the mere offer of a benefit imposes no regulatory burden at all are simply inapposite. Judge Lay also points out that "in 1992, average spending by all candidates," both opposed and unopposed, "exceeded the thresholds that now trigger the spending limits waiver" by the publicly funded candidate. *Id.* at 1562 n. 25. App. 37. The "trigger" levels are sufficiently low that *any* competitive campaign will invoke the waiver, unless the challenger agrees to abide by the spending limits. Under these circumstances it is fatuous to say that spending limits are "voluntary" because the choice is wholly within the challenger's control. The choice between running a credible campaign and accepting the limits is not the exercise of an option, but the accession to a threat. A regulatory burden sufficient to trigger First Amendment *inquiry*, distinguished from the question of *justification* under that inquiry, should be defined in this context as the "offer" of the choice of the lesser of two evils, both created by the State. *Id.* at 1560-61. The conclusion is unavoidable that this system imposes *some* discernable regulatory burden on political expression.

Former Chief Judge Lay, in his dissent, agreed with petitioners on this point. He adopted their approach to the issue of whether the system imposed any regulation *at all*, as distinguished from the question whether the burden imposed is justified. The question whether expression is burdened should be determined by examining "whether a candidate who faced a choice not to limit her full access to political speech will be [made] any worse off [by the statutes] in choosing to do so." *Rosenstiel*, 101 F.3d at 1560-61 (Lay, dissenting). App. 34-35. The challenged laws clearly imposed *some* burden of regulation. This was because they:

> add[ ] disincentives which make a privately funded candidate worse off than she would otherwise be. Her publicly financed opponent, who has chosen to receive a public subsidy, can now keep the public subsidy, obtain the benefit of the [tax] contribution refund for all past *and* future contributions, *and* spend without limit.

Rosenstiel, 101 F.3d at 1561 (Lay, dissenting) (emphasis in original). App. 35.

The majority's failed effort to blinker this issue rather than resolve it proves that former Chief Lay was correct. As hypocrisy is the compliment vice pays to virtue, so verbal manipulation is the fate of legal tests that produce the "wrong" result.

Chief Lay was also correct in noting that the majority's remarks on this issue, considered as legal *reasoning*, are literally "meaningless." The majority wrote that the statute's "inducements" did not make the statutory scheme "coercive because they are not inherently penal." *Rosenstiel v. Rodriguez*, 101 F.3d at 1550. App. 12. But even if this rhetoric has no actual meaning, it clearly has considerable *significance*. The significance of this rhetoric is very clear:

the First Amendment, as the Eighth Circuit now reads it, imposes no limits whatever on the state's power to compel candidates to adhere to spending limits, at least so long as that power takes the form of competitive penalties imposed for their refusal. In part *because* it was "meaningless," the significance of the panel's holding lies in showing how wide a channel the court has opened in the First Amendment.

As Chief Lay also noted, this abdication is flatly inconsistent with all of this Court's campaign finance precedents beginning with *Buckley*. This Court has repeatedly explained why strict scrutiny must be applied to campaign finance regulation. The reason is that these statute are aimed at the content of communication, and seek to rearrange the mix of political messages available to the public. As this Court recently explained, strict scrutiny is required because

> [i]t is beyond dispute that the [state] interest in regulating the . . . giving or spending [of] money 'arises in part because the communication is itself thought to be harmful. . . .' Indeed, were the expenditure limitation unrelated to the content of expression, there would be no need for Congress [or the states] to 'equaliz[e] the relative ability' of interested individuals to influence elections.'

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445, 2467 (1994), quoting *Buckley v. Valeo*, 424 U.S. 1, 17, 48 (1976).

The majority below sought to "avoid[ ] the fundamental principles of *Buckley*. . . ." *Rosenstiel*, 101 F.3d at 1563 (Lay, J., dissenting). But those principles were unavoidable on these facts, and they clearly forbade the reasoning and the result reached below. Cases involving the pure offer of a benefit, such as *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) and *Republican National Committee v. FEC*,

487 F.Supp. 280, 283-86 (S.D.N.Y.) (three judge court), *aff'd mem.*, 445 U.S. 955 (1980), relied on by the majority, are simply not at all in point. These cases stand simply for the proposition that a pure reward is beyond constitutional scrutiny because it does not coerce or penalize the beneficiary. As petitioners argued and Chief Lay clearly saw, to determine whether any burden at all is imposed, one must ask whether the law's "disincentives . . . make a privately funded candidate worse off than she would otherwise be." *Rosenstiel*, 101 F.3d at 1561 (Lay, dissenting). App. 35. Whatever else might be said for it, the system imposed on candidates in Minnesota cannot possibly be thought to offer a pure reward and these cases are entirely distinguishable.

The result reached by the majority simply violates this Court's precedent at the most fundamental level. The Court should grant the writ for this reason alone.

B. The Majority Incorrectly Found That, Even if Strict Scrutiny Applied, the Challenged System Passed That Test.

The majority also found that the challenged system passed the strict scrutiny test, as that Court interpreted it. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553-55 (8th Cir. 1996). App. 17. The technique, however, was to consider whether each element of the state's system individually and abstractly would be coercive. The majority then finds that each element individually is non-coercive, and finds that it follows from this that all of them considered together are not coercive. *Id.* Because the question of "voluntariness" versus "coercion" is always a cumulative question of more or less, rather than a series of separate questions of yes or no, the logical flaw in this reasoning is too apparent to require comment.

Judge Lay was also correct in holding that the State had simply not shown that the level or type of coercion imposed here is justified by the interests asserted. The State of Minnesota argued that its interest in encouraging participation in the system was compelling because this would free candidates from the need to engage in private fundraising. This was said to justify all of the provisions in suit, and that each was "narrowly tailored" to that same end. The compelling interest, therefore, entirely stems from the State's goal of achieving high levels of participation in its system. Yet the State continues to enact ever more coercive restrictions on privately funded candidates, and does so despite the very high levels of participation already achieved. Judge Lay noted that without the "tax contribution refund" or tax credit provision, participation in the system was between 89 and 93 percent. *See Rosenstiel*, 101 F.3d at 1564 (Lay, J. dissenting). App. 42. And the system was expanded in 1996 to cover all candidates, rather than just major party ones, in response to a *single* privately funded campaign that exceeded the limits, the only such campaign in the state. Minnesota legislators have a clear reason for constantly increasing the level of coercive "incentives" they want to see imposed on candidates for office. But the legislature's concern is not with the numbers of challengers who violate the spending limits. Those numbers are vanishingly small. The legislature is instead concerned about the targets of those campaigns, namely themselves, and particularly their legislative leaders.

The overall problem the State continually needs to "solve," moreover, is created by the State itself. The plain fact is that the spending limits imposed on these races are simply too low to mount a competitive campaign against an entrenched incumbent officeholder. As Judge Lay noted,

> if the state is concerned that publicly financed candidates are "at an insurmountable disadvantage,"

> against privately funded candidates in the absence of these [coercive] provisions, . . . it seems plain that the state's spending limits are too low.

Rosenstiel, 101 F.3d at 1564 (Lay, dissenting). App. 43.

The compelling interest test, however, forbids the State to create this problem and then "solve" it with ever more coercive restrictions on political expression. This is hardly the "least burdensome alternative" to the suppression of speech. On the contrary, if the State were allowed to itself create the "compelling" problems its restrictions are then "necessary" to solve, the force of the strict scrutiny test itself would quickly be destroyed.

Judge Lay explained the proper approach.

> The constitutionally proper means to stimulate participation is not to burden the privately financed candidate's speech, . . . but rather to provide the publicly financed candidate with the opportunity for more speech through higher subsidies or higher spending limits, or both.

Id.

The majority's application of "strict scrutiny" allows the State to create its own "compelling interest," and then to continually suppress ever more political expression in its effort to "solve" that problem. Where the problem is speech, generally "[t]he remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The Constitution prefers more speech to less. Where solutions of this sort are available, as they so clearly are here, the most restrictive course is unconstitutional under the compelling interest test.

C. The Challenged, Coercively Imposed Spending Limits Discriminate Against Electoral Challengers, Particularly Where the Incumbent In Entrenched.

Government-imposed conditions, of course, always divide persons into the favored group that agrees to the condition, and a disfavored one that does not. As Kathleen Sullivan has stated,

> This discrimination raises a . . . distributive concern whenever the content of a liberty includes some equality principle or entitlement to *government neutrality*. Targeting of benefits can destroy such equality or neutrality as readily as can imposition of harm: for example, government can skew political speech, association, and the system of representation they support *whether it jails Democrats or offers cash bounties to Republican converts*. . . . Whenever obligations of government evenhandedness are central to a rights . . . conditions on a benefit designed to prefer one otherwise protected choice to another will pose a danger.

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1453, 1496-97 (1989) (emphasis added). "[S]peech is the paradigm case," particularly political speech. *Id.*

This Court has regularly emphasized that discrimination among speakers or topics or viewpoints is no more permissible in the imposition of conditions on benefits than it is when government acts by direct prohibition. *See, e.g., Board of Commissioners of Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S.Ct. 2342 (1996); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983), quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

Soverign power that imposes discrimination or selectivity in conditioning benefits, that is, must be reviewed with the *same strictness* as a direct regulation. *Wabaunsee County v. Umbehr*, ___ U.S. ___, 116 S.Ct. at 2347; *Regan*, 461 U.S. at 548, *see also, e.g., Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1987) and *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (selective or discriminatory denial of tax exemptions stricken under strict scrutiny); *Speiser v. Randall*, 357 U.S. 513 (1958) (striking requirement of proof of "loyalty" as conditions on veterans' benefits). The requirement of government neutrality or evenhandedness may not be a feature of unconstitutional conditions "doctrine" in general, but it is a central principle of the substantive law of the First Amendment. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 2468 (1994). That substantive First Amendment principle, in turn, is enforced by strict review of conditions burdening those rights.

This is why the operation of the allegedly unconstitutional condition in each case must be evaluated in light of the principles underlying the relevant constitutional provision. Congress could clearly, for example, condition a grant to a farmer on his agreement not to plant more than a certain number of acres. But Congress clearly could not condition the same grant on the farmer's agreement not to criticize farm policy. *See* Nowak & Rotunda, *supra*, at 955. The reason for this result cannot be found by simply comparing the degree of empirical "coerciveness" of the two conditions under a unitary and abstract doctrine of unconstitutional conditions. The farmer, after all, may very much wish to plant more crops, and may have no interest whatever in criticizing farm policy.

The problem for the second regulation lies not in the degree of the coerciveness alone, but in the relevant *limitation* on governmental power. The reason that only the latter condition is unconstitutional is clear when it is viewed against

the substantive principles of the First Amendment. The First Amendment strictly forbids government to use *any* of its powers to manipulate the content of the nation's political dialogue. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. at 2468. The difference between the two cases is that the Commerce Clause does not impose this limitation on Congress, while the First Amendment does so. *See* Nowak & Rotunda, *supra*.

In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), for example, the Court struck down a tax on printed material that exempted some magazines but not others. The Court held that "a discriminatory tax on the press burdens rights protected by the First Amendment," and that evidence of "an improper censorial motive" was not required. *Id.* at 227-28, citing, inter alia, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (striking down tax that fell on only some newspapers), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down tax on largest newspapers in Huey Long's Louisiana said to have been hailed as a tax on "lying" by the governor). Because the discriminatory statute burdened First Amendment rights, strict scrutiny was required. *Arkansas Writers' Project*, 481 U.S. at 231. The tax failed that strict test.

The coercive laws challenged here make the already daunting advantages to incumbents virtually insurmountable, as the facts of Rosenstiel's potential race demonstrate. Rosenstiel would have faced a very well-known incumbent who has served many years in the same office. The less the public hears about such a campaign, the better it is for the incumbent. Well-known incumbents know that the enormous power of inertia in human affairs is entirely on their side. Serious challengers, on the other hand, know that they cannot hope to run a competitive race unless they can make a very large noise. And that noise must be large enough to enable the

challenger to be heard above the din the incumbent is capable of generating.

The coercive imposition of very low spending limits is devastating to challengers such as Rosenstiel. Minnesota law imposes roughly equivalent, and coercively low, spending limits on challengers and incumbents. But unknown challengers, everyone agree, must out-spend a well known incumbent, sometimes by a factor of several times, to mount even a reasonably competitive campaign. *See, e.g., generally Service Employees Int'l Union*, 955 F.2d at 1314-15.

Very low and coercively imposed spending limits thus discriminate against challengers by treating things that are very different as if they were nearly identical. This is itself very effective discrimination against challengers. As this Court has noticed, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*. . . . " *Jenness v. Fortson*, 403 U.S. 431, 442 (1970), citing *Williams v. Rhodes*, 393 U.S. 23 (1968) (state campaign regulations unconstitutionally discriminated against minor parties by treating minor and major parties as if they were alike).

Campaign finance scholars have also agreed. "The problem is not equalizing the amount [of funding] between candidates but rather simply getting money to challengers so that they can mount competitive races." G. Jacobson, *Money in Congressional Elections* 218 (1980), quoted in Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 Case Western Res. L. Rev. 97, 123 (1989).

The limits of constitutionally permissible discrimination against challengers and in favor of incumbents that a campaign finance law regime may constitutionally create were explored in *Service Employees Int'l Union, AFL-CIO v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1319 (9th Cir.), cert. denied 112 S.Ct. 3056 (1992). In *Service Employees*, the

California legislature had imposed contribution limits in candidate election of $1000 for individuals, $2500 for political committees, and $5000 for "broad based political committees" that received contributions from one hundred persons or more. *Id.* at 1314, n.2. A crucial fact was that the California statute's limitations departed from the federal model by being keyed to the *fiscal year* of the election, rather than the *election cycle* for the office in question. *Id.* at 1312-14. This is also true of Minnesota's limitations on campaign contributions and expenditures. Minnesota's contribution and expenditure limitations are keyed to "election years" and "nonelection years." *See* Minn. Stat. Sec.'s 10A.25, Subd. 2 (a) setting expenditure limits "[i]n a year in which an election is held,"); and Minn. Stat. Sec. 10A.27, Subd. 1(a) - (e) (contributions and anti-bundling tied to "election year[s]" and "other years").

As the Ninth Circuit Court noticed in *Service Employees*, 955 F.2d at 1315, such calendar or fiscal year restrictions appear to limit both challengers and incumbents equally but in fact fall most heavily on challengers. Although the California law appeared neutral on its face, its actual operation was unconstitutionally discriminatory.

This was because, as the court recognized, challengers begin with little name recognition, and must spend money incumbents need not spend to achieve it. Moreover, challengers typically do not decide to run years in advance, but only in the year of election, or at most the year before. *Service Employees*, 955 F.2d at 1315. California's law effectively allowed incumbents three or four "dips" at their contributors' wells, one in each of their four years. Challengers, who begin behind the blocks in any event, were limited by political realities to one or two such trips at the most. The law thus protected incumbents by artificially increasing the difficulties of electoral challenges to them. *See Service Employees*, 955 F.2d at 1318-21.

The majority below had two responses to these arguments. First, the majority suggested that even if incumbents were using election law to protect themselves from challenge, it did not understand how there could be any constitutional problem with that. *See Rosenstiel*, 101 F.3d at 1556. Yet as petitioner has pointed out at every stage in this litigation, this Court believes that the discriminatory regulation of political expression violates the First Amendment. Indeed, this Court has stated that the *intentional suppression of political opposition* constitutes viewpoint discrimination of the sort that could not even be justified by a "compelling" state interest. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *see also Rosenstiel*, 101 F.3d at 1564 n. 28 (Lay, J., dissenting) (state interest in differentially rewarding candidates for endorsing public financing, without more, constitutes viewp[oint discrimination).

The majority refused to consider petitioners' strongly pressed arguments that Minnesota's calendar year system, like that in *Service Employees*, discriminated in favor of incumbents and against challengers. The majority, incredibly, declined by stating that petitioners had not "mentioned this issue" in the district court. *Rosenstiel*, 101 F.3d at 1557 n. 14. App. 27 n.14. Yet precisely the argument on this score stated above was in the very first memorandum petitioners filed in this matter on August 19, 1994, in their Memorandum in Support of Motion for Preliminary Injunction, dated August 19, 1994, at 28-32; *see* Memorandum; *and see* Docket Sheet, Joint Appendix, Case No. 95-1885 MNMI at A 1. Petitioners believe (and hope) that this error in the majority opinion below is the result of a mere oversight.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 11, 1997

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1885

Patrick Rosenstiel; Christopher Longley,	*	
Plaintiffs-Appellants,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
Carolyn Rodriguez, in her capacity as Chair of the Ethical Practices Board, or her successor,	*	
Defendant-Appellee.	*	

Submitted: November 15, 1995

Filed: December 11, 1996

Before HANSEN, LAY, and MURPHY, Circuit Judges.

HANSEN, Circuit Judge.

Patrick Rosenstiel and Christopher Longley appeal a final judgment of the district court[1] upholding the constitutionality of Minnesota's campaign finance statutes. Rosenstiel and Longley seek a declaration that several provisions of the law are unconstitutional because they allegedly coerce a candidate into participating in Minnesota's public campaign financing program, thereby burdening that candidate's First Amendment rights. They further maintain that the provisions are constitutionally infirm because they do not survive strict scrutiny. Finally, they contend that these provisions impermissibly discriminate against challengers. After conducting a careful review, including an amendment to the statute which the Minnesota legislature enacted after we heard oral arguments, we affirm.

I.

The State of Minnesota (State) has enacted a campaign financing system which permits candidates for certain elected state offices to receive a public subsidy in exchange for the candidate's agreement to adhere to specified limits on campaign expenditures. Minn. Stat. Ann. §§ 10A.25 (10)(a), 10A.322(1)(a) (West Supp. 1997). A candidate must sign an agreement to be bound to the applicable campaign expenditure limits in order to receive the public subsidy. Id. § 10A.322(1)(a). The participating candidate must also independently raise a certain amount ($35,000 for governor down to $1,500 for state representative) in contributions in order to be eligible for the public subsidy. Id. § 10A.323. A Minnesota taxpayer can claim a full refund of up to $50 per year (or $100 for a couple filing jointly) for a campaign contribution made to a publicly funded candidate; however, no

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

refund is permitted for a campaign contribution made to a candidate who is not publicly funded. Id. § 290.06(23) (hereinafter referred to as "contribution refund").[2]

The expenditure limitations for each public office to which the State's campaign financing scheme applies are delineated in section 10A.25(2)(a), and range from $1,626,691 for a gubernatorial candidate down to $20,335 for a candidate for state representative. The amount of public subsidy available to a candidate who is running for an office to which the State's financing scheme applies is determined by way of formula. Id. § 10A.31(5). However, the amount of public subsidy the candidate receives may not exceed 50 percent of the expenditure limits applicable to the office which the candidate seeks. Id. § 10A.31(7). A candidate who has agreed to adhere to the expenditure limits but later accepts campaign contributions or makes campaign expenditures in excess of those limits is subject to a civil fine of up to four times the amount by which the contribution or expenditure exceeded the limit. Id. § 10A.28(1).

Prior to an amendment in April 1996, the above expenditure limits were only applicable to a candidate if the candidate's major-party opponent likewise agreed to be bound by the expenditure limits. Id. § 10A.25(10) (West Supp. 1996) (repealed). Thus, when a publicly financed candidate was opposed by a nonparticipating major party candidate, the publicly financed candidate was no longer required to adhere to the specified expenditure limits for his office but was still eligible to receive the public subsidy. Id. §

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[2] To clarify, however, this is the total dollar amount which may be claimed as a refund in a calendar year for a contribution or contributions made to candidates participating in the State's scheme. In other words, although an individual may have made contributions to participating candidates in a calendar year totaling $500, that individual may only claim a $50 refund for that year.

10A.25(10)(b)(i)-(ii) (West Supp. 1996) (repealed) (hereinafter referred to as "expenditure limitation waiver").

In 1994, Appellants Rosenstiel and Longley (Appellants) were candidates for different seats in the Minnesota House of Representatives. Both enrolled in the State's public campaign funding program. They later filed this action on August 19, 1994, alleging that the expenditure limitation waiver and the contribution refund violated their First Amendment rights. Both claimed by way of affidavit that they believed they could privately raise campaign funds in excess of the law's expenditure limits which they had agreed to observe. They subsequently moved for a preliminary injunction, seeking to enjoin the enforcement of these provisions. The district court denied injunctive relief but noted that the Appellants had proffered sufficient evidence to demonstrate that they were likely to prevail on their claim that the contribution refund was unconstitutional.

The Appellants later moved for summary judgment. The district court held that the expenditure limitation waiver and the contribution refund passed constitutional muster, denied Appellants' motion for summary judgment, and accordingly dismissed their complaint.[3] Rosenstiel and Longley appealed.[4]

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[3] Additionally, the district court declared unconstitutional an additional provision the Appellants challenged, Minn. Stat. § 10A.25(10)(b)(iii) (West Supp. 1996). This provision provided that when a publicly funded candidate faces a major party candidate who does not enroll in the State's public funding program, the publicly funded candidate also is eligible to receive all or part of the subsidy which was set aside for his opponent. Although the Appellants repeatedly attack the constitutionality of this provision in their brief, the State has not appealed the district court's ruling that this provision is unconstitutional. Accordingly, its validity is not before us, and we decline to discuss it further, except to observe that the Act of April 11, 1996, repealed the provision.

[4] Although neither Appellant was successful in his quest for public office, both claim that they harbor future political aspirations and intend

After this case was submitted to us, an amendment passed by the Minnesota legislature altering the operation of the expenditure limitation waiver became effective. See Act of April 11, 1996, ch. 459 (S.F. 840), amending Minn. Stat. Ann. § 10A.25(10) (West. Supp. 1996). Under the amendment, a candidate participating in the State's public financing of campaigns is not released from the expenditure limitation simply by virtue of being opposed by a nonparticipating, major-party candidate. Rather, when a participating candidate squares off against any nonparticipating candidate, the participant is released from the expenditure limit when the opponent receives contributions or makes expenditures equalling 20 percent of the applicable limit prior to 10 days before the primary election, and contributions or expenditures equalling 50 percent of the applicable limit thereafter. Minn. Stat. Ann. § 10A.25(10)(a)(1)-(2) (West. Supp. 1997).

The amendment thus makes several changes to the mechanics of the expenditure limitation waiver. First, the expenditure limitation waiver comes into play when any nonparticipating opponent engages in the triggering event, i.e., receives contributions or makes expenditures in excess of the specified threshold, whereas before, the triggering act had to be done by a nonparticipating major-party opponent. Second, and more importantly, the triggering event itself occurs when any nonparticipating opponent reaches the specified threshold in campaign contributions or expenditures. Previously, the triggering event was simply the major party opponent's decision not to participate in the State's public campaign financing. In other words, the amendment eschews an

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to run for state office. Thus, this case is not moot because it involves issues which are "capable of repetition, yet evading review." Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (internal quotations omitted); see also Whitton v. City of Gladstone, 54 F.3d 1400, 1402 n.5 (8th Cir. 1995) (same).

automatic waiver to participating candidates at the moment their major party nonparticipating opponent declines to enroll, in favor of a wait-and-see approach based on actual contributions to or expenditures made by any nonparticipating opponent.

At the direction of this court, the parties submitted letter briefs concerning the effect, if any, the amendment had on the issues presented in this case, and whether remand to the district court for further proceedings was necessary. Both sides strenuously contend that a remand is unnecessary. Concerning the merits of the amendment, the Appellants assail its validity primarily on the same grounds they contested the former language, i.e, that it coerces candidates to participate, and it is not narrowly tailored to further a compelling governmental interest. The State, on the other hand, contends that, even assuming the prior expenditure limitation waiver coerced compliance, the amended statute is not coercive because the nonparticipating candidate solely determines whether to trigger the expenditure limitation waiver for the publicly-financed candidate by receiving contributions or making expenditures in excess of the applicable threshold. Alternatively, the State maintains that, like the former language, the amendment is narrowly tailored to serve a compelling governmental interest.

II.

It is clear that we must review the judgment appealed from in the light of the Minnesota statute as it now stands, not as it stood when the judgment below was entered. Fusari v. Steinberg, 419 U.S. 379, 387 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972). Whether the amendment so changes the nature of the dispute before us so as to make the appeal moot is a close question.

The Supreme Court has held that where a new statute "is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues" the controversy is not mooted by the change, and a federal court continues to have jurisdiction. Northeastern Fla. Chapter v. City of Jacksonville, 508 U.S. 656, 662 n.3 (1993). Further, if the new statute disadvantages the complainants in the same fundamental way the repealed statute did, the amendment does not divest the court of the power to decide the case. Id. at 662. Here, the amendment relates only to one subdivision of the whole larger statutory scheme assailed by the Appellants' complaint. It repealed only one of the five specific sections plaintiffs attacked and replaced it with language that still permits a waiver of the expenditure limitations while remaining eligible for the public subsidy. Essentially the amendment changes the triggering event necessary to bring the spending limits waiver into play and, accordingly, the point in the campaign when the spending limits are removed from a participating candidate. These changes are not insignificant at least as far as the actual operation of the statute is concerned. On the other hand, with respect to its effect, the amended statute still impairs the Appellants in the very same way that they claimed the prior section did. In the Appellants' view, the amendment broadens the coverage of the law (by applying it to any opponent of a participating candidate rather than just a major-party opponent) and is more, not less, coercive than the repealed subdivision. (Appellants' Letter Br. at 2, June 14, 1996.) We believe that the fundamental nature of the challenged statute continues unchanged. The challenged conduct (the waiver of the spending limits) continues to exist under the new language of § 10A.25(10). The public subsidy and the tax refund provisions are unchanged. We do not believe that the controversy upon which the district court rendered its judgment is substantially different from the one

presented to us by the amended statute. Accordingly, we hold the case is not moot.

III.

Because the Appellants' claims require us to evaluate the constitutionality of the challenged provisions, our review is de novo. Falls v. Nesbitt, 966 F.2d 375, 377 (8th Cir. 1992).

A.

The Appellants contend that the expenditure limitation waiver and the contribution refund cause the State's campaign financing system to infringe upon the First Amendment rights of the candidates for political offices to which the plan applies. "When considering whether a campaign finance law unconstitutionally infringes freedom of speech, this Court's task is to decide whether the provision in question actually 'burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.'" Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422, 1424 (8th Cir. 1995) (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990)), cert. denied, 116 S. Ct. 2579 (1996). Our first task, then, is to determine whether the challenged provisions impose any burden at all on the First Amendment rights of candidates.

In Buckley v. Valeo, 424 U.S. 1, 85-109 (1976), the Supreme Court held that while the imposition of a mandatory limit on campaign expenditures violated a candidate's First Amendment rights, a voluntary system under which candidates agreed to limit campaign expenditures in exchange for public financing of their campaigns was constitutionally permissible. Specifically with regard to this point the Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id. at 57 n.65. See also Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (plurality opinion) (political party independent expenditure provision inconsistent with First Amendment).

Such a system of public financing of political campaigns was expressly approved in Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), aff'd mem., 445 U.S. 955 (1980) (RNC). In RNC, the plaintiffs challenged a federal law which provided $20,000,000 in public funding to presidential candidates who agreed to limit campaign expenditures to that amount. Id. at 283. The court held that this scheme did not burden a candidate's First Amendment rights because it simply provided an additional option for accumulating campaign funds. Id. at 285. "Each candidate remains free under the Fund Act, instead of opting for public funding, to attempt through private funding to raise more than the '$20,000,000 plus' public funding limit and to spend any amount of funds raised by private funding, without any ceiling." Id. at 283-84. The Court observed that each candidate would presumably select the method for raising campaign funds that he thought to be most advantageous. Id. at 285. Accordingly, the court ruled that this choice-increasing framework imposed no burden on a candidate's First Amendment rights. Id.

The Appellants contend that the State's public financing scheme is distinguishable from that referred to in Buckley and expressly approved in RNC. Specifically, the Appellants argue

that the expenditure limitation waiver, Minn. Stat. Ann. § 10A.25(10), and the contribution refund, Minn. Stat. Ann. § 290.06(23), are coercive because they create such a large disparity between the benefits provided to publicly financed candidates and the corresponding restrictions imposed on those candidates. Stated otherwise, the Appellants contend that these provisions make the public financing option so attractive that they effectively compel candidates to enroll in the State's financing plan. This compelled participation, continue the Appellants, is a burden on their First Amendment rights. The State counters by arguing that the expenditure limitation waiver and the contribution refund are simply additional inducements provided to encourage maximum candidate participation in its public financing of political campaigns and that the inclusion of these inducements gives the campaign financing plan a relative balance in terms of benefits provided to participating candidates and the restrictions imposed on those candidates. Because participation is truly voluntary, the State submits, the Appellants' argument that their First Amendment rights are burdened is without merit. We agree with the State.

The First Circuit addressed similar arguments concerning a Rhode Island financing scheme in Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993). In Vote Choice, in an effort to make its public financing scheme for gubernatorial candidates more attractive, Rhode Island permitted participating candidates, in addition to receiving a public subsidy, to receive campaign contributions from individuals or PACs of up to $2,000 per year, while candidates who eschewed public financing were allowed to receive only $1,000 per year from those donors (what the Vote Choice court referred to as a "cap gap"). Id. at 30.[5] The Vote Choice

[5] Rhode Island's scheme also possessed several other features which are similar or identical to the State's scheme before us. For candidates

plaintiff/candidate claimed that the cap gap caused Rhode Island's scheme to become coercive, thereby burdening a candidate's First Amendment rights. Like the Appellants here, the essence of the Vote Choice plaintiff/candidate's claim was that by providing incentives beyond a cash subsidy to publicly financed candidates, Rhode Island's scheme was so benefit-laden that gubernatorial candidates were really offered no alternative but to enroll Id. at 38.

The Vote Choice court disagreed. The court noted that there was nothing inherently penal about the cap gap and accordingly rejected the plaintiff/candidate's contention that Rhode Island's scheme was per se coercive because it sought to punish non-participants rather than simply reward participants. Id. The court then ruled that the enactment of the cap gap did not make the incentives in Rhode Island's scheme so strong that candidates were coerced into participating; the court noted that, with the cap gap, the scheme achieved a relative balance between advantages afforded to, and restrictions placed on, publicly financed candidates. Id. at 38-39. In sum, Rhode Island created a campaign financing option which increased a candidate's choice concerning methods for raising campaign funds, participation in this program was truly voluntary, and thus the plaintiff-candidate's claim of coerced participation was without merit. Id. at 39. See also Wilkinson v. Jones, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995) (Kentucky scheme permitting

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that opted for public financing, Rhode Island matched contributions the candidate raised through private means up to a certain specified amount. Id. at 30. Additionally, a publicly financed candidate was permitted to exceed the expenditure limits and retain the public subsidy if opposed by a privately financed candidate who exceeded the expenditure limit in either campaign contributions or expenditures. Id. at 30 n.5. However, the Vote Choice plaintiff/candidate did not challenge either of these aspects of Rhode Island's scheme and thus the court did not assess their validity.

publicly financed candidate to disregard expenditure limit and continue receiving state matching funds when privately financed opponent exceeded that amount was not coercive and thus imposed no burden on candidate's First Amendment rights).

We find the analysis from Vote Choice provides helpful guidance in resolving the Appellant's claim that Minnesota's scheme is coercive. Like the Rhode Island public financing scheme challenged in Vote Choice, the State's scheme in this case provides certain inducements -- the expenditure limitation waiver and the contribution refund in addition to a public cash subsidy -- in order to encourage maximum candidate participation. These inducements, however, do not per se render the State's scheme coercive because they are not inherently penal.

Further, the inclusion of these additional inducements in the State's public financing package does not cause the package to become so benefit-laden as to create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns. Rather, by including these additional inducements, the State's scheme achieves a relative balance between the benefits provided to publicly financed candidates and the restrictions the candidates must accept. The expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.

We believe the statute is not coercive because it permits the nonparticipating candidate to raise a certain measure of funds before triggering the expenditure limitation waiver for

his participating opponent. Rather than releasing the participating candidate from the expenditure limits at the outset, the statute as it now stands permits the nonparticipating candidate to control whether and when the participating opponent will be freed from the limits. Thus, in a sense, the amendment works in favor of, rather than to the detriment of, the nonparticipating candidate. See Wilkinson, 876 F. Supp. at 927 (rejecting claim of coercion to enroll in state public financing scheme because privately-financed candidate completely controlled the triggering event by exceeding the threshold in campaign funds or expenditures).[6] Similarly, the contribution refund, which permits a Minnesota citizen to obtain a refund of up to a total of $50 per year for contributions made to publicly financed candidates, is simply an additional public subsidy provided to participating candidates. See Buckley, 424 U.S. at 107 n.146; Regan v. Taxation with Representation of Washington, 461 U.S. 540,

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[6] We point out, only as an illustration of how the statute actually works to the benefit of nonparticipants and thus cannot be construed to "coerce" enrollment, that it is possible that under certain circumstances the amendment could be employed to work to the substantial disadvantage of participants. This disadvantage arises from the temporal impediment a participating candidate faces before he is released from the expenditure limits; that is, he is only released when his opponent triggers the waiver. Specifically, if a nonparticipating candidate waited until the final days before an election to exceed the triggering limits, and then waged an all- out campaign blitz, the publicly-financed candidate, who is not released from the limits until his opponent triggers the waiver, potentially would not have sufficient time to raise enough campaign funds to effectively counter his opponent's campaign blitz. Obviously, such a sequence of events could be particularly harmful to the publicly-financed candidate's chances of electoral success. In any event, we simply offer this example to illustrate that because the privately-financed candidate alone determines whether the publicly-financed candidate will be permitted to exceed the limits, it cannot seriously be argued that the State's scheme coerces candidate participation.

544 (1983) (tax credits and deductibility for contributions are a form of government subsidy to the entity or activity to which the contributions are made). While the scheme's benefit-restriction ratio is not, to borrow from the Vote Choice court, in "perfect equipoise," see 4 F.3d at 39, we are convinced that it achieves the rough proportionality necessary to entice, but not coerce, candidate participation.

The Appellants argue that the legislative history underlying the State's public financing system and a prior statement of this court illustrate that the scheme was devised to compel candidate participation. Specifically, Senator John Marty of Roseville, Minnesota, a chief proponent of the public financing scheme, stated that it was to operate "as a real heavy club," ostensibly meaning to force candidate participation. Weber v. Heaney, 995 F.2d 872, 877 n.7 (8th Cir. 1993) (quoting Minnesota Congressional Campaign Reform Act, 1990: Hearing on S. 577 before the Subcommittee on Elections and Ethics, 76th Legis. (Mar. 1, 1989) (statement of Senator Marty)). Further, in Weber, after holding that the Minnesota Congressional Campaign Reform Act (MCCRA) was preempted by the Federal Election Campaign Act (FECA), we examined Senator Marty's statement in a footnote, noting that it was debatable whether participation in the State's public funding scheme was truly voluntary. 995 F.2d 872, 877 n.7 (8th Cir. 1993). Specifically, we stated:

> We also question whether the limitations are truly voluntary. Contributors may receive a refund from the state when they contribute to a candidate who has agreed to limit campaign expenditures, which will enhance that candidate's fund raising ability. If a candidate agrees to limit expenditures and then does not abide by the limits, the candidate suffers substantial penalties. Additionally, candidates who do not agree to be bound by the spending limits are

> penalized because their opponents who have agreed to the limits will still receive public financing, but will not be bound by their agreement. The Minnesota law is not a carrot enticing candidates to comply; as a proponent of the bill boasted, it is "a real heavy club." Minnesota Congressional Campaign Reform Act, 1990: Hearing on S. 577 before the Subcommittee on Elections and Ethics, 76th Legis. (Mar. 1, 1989) (statement of Senator Marty)

Id. The Appellants contend that, based on the above quotation, we are bound by principles of stare decisis to hold that the challenged provisions here are coercive and, in any event, Senator Marty's statement is definitive proof that the Minnesota legislature sought to compel candidate participation.

We believe that the Appellants lean too hard on Senator Marty's statement as well as the footnote in Weber. Significantly, it appears that Senator Marty's statements were made in the 1990 Minnesota legislative session during debate surrounding the MCCRA, not with respect to the provisions at issue in this case; the Appellants have made no showing, other than a bare assertion, that the statements were intended to apply to the provisions they challenge here. Furthermore, an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body: in the absence of a showing that a more significant segment of the Minnesota legislature shared Senator Marty's views, we are not inclined to conclude that his statements accurately reflect the legislative purpose underlying the State's public financing scheme. See United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (when determining constitutionality of a statute, it would be improper to decide its fate "on the basis of what fewer than a handful of Congressmen said about it.").

With respect to footnote 7 in Weber, we prefaced our comments with "We also question . . .," clearly illustrating that our subsequent statements were little more than observations about the Minnesota scheme. Indeed, earlier in the same footnote we stated, "Whether the expenditure limitations under Minnesota law are voluntary is irrelevant when considering whether the state law is preempted." Id. Thus, the voluntariness of the MCCRA was tangential to the central holding of the case: that the MCCRA was preempted by FECA. As such, these statements are obiter dicta. Weber left to another day the detailed analysis of the First Amendment implications of the Minnesota scheme. "The district court held that the First Amendment was not violated by the expenditure limitations in [MCCRA]. That issue is not before us." Id. at 876 n.6. Further, in contrast to the statute at issue in Weber, the present statute does not permit participating candidates to toss off the expenditure limits just because their opponent declines to participate. It is the nonpublicly-funded opponent's conduct in raising money or spending it in excess of the statutory threshold amounts that triggers the limitations waiver for the participating candidate. Weber, therefore, does not dictate a conclusion that the provisions here are coercive and violate the First Amendment.

In sum, the State has created a public financing scheme for certain elected offices which is available to candidates who meet certain threshold qualifications. This scheme presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary. Under this choice-increasing framework, candidates will presumably select the option that they feel is most advantageous to their candidacy. Given this backdrop, it appears to us that the State's scheme promotes, rather than detracts from, cherished First Amendment values. See Vote Choice, 4 F.3d at 39; see Wilkinson, 876 F. Supp. at 926-28. See also RNC, 487 F. Supp. at 285. Accordingly, we reject the Appellants' claim

that the challenged provisions create a coercive public financing scheme that burdens a candidate's First Amendment rights.[7]

B.

Our conclusion that the challenged provisions do not burden a candidate's First Amendment rights is a sufficient basis on which to affirm the judgment of the district court. However, even if we assume that the State's scheme does burden a candidate's First Amendment rights to some degree, the scheme generally, and the challenged provisions specifically, are still constitutionally permissible because they survive strict scrutiny; that is, they are narrowly drawn to serve a compelling governmental interest.[8]

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[7] We also disagree with the Appellants' argument that in order to make participation in a public funding scheme truly voluntary, the governmental entity must provide more funding to the publicly funded candidate than the candidate could raise through private means. Aside from the fact that it would be an exercise in pure speculation to determine the amount a given candidate for a particular office could raise in a campaign, the public financing cases have imposed no such requirement. Cf. RNC, 487 F. Supp. at 285 (rejecting argument that public financing scheme was coercive because it offered more public funds than the candidate claimed he could privately raise). This claim is also undermined by evidence in the record illustrating that the average publicly financed campaign for a state senate or house of representatives seat spends only approximately 2/3 of the amount permitted by the applicable expenditure limit. Thus, most publicly financed candidates do not make campaign expenditures which even approach the applicable expenditure limits. We accordingly decline to further address this somewhat unorthodox argument.

[8] The State contends that we should apply the intermediate level of scrutiny articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), rather than strict scrutiny, to the refund provision. Seizing upon an excerpt from Buckley, the State contends that the Supreme Court indicated that a lower level of scrutiny applies in evaluating

A campaign finance law which burdens protected speech will be upheld if the governmental entity can show that it furthers a compelling governmental interest and is narrowly drawn to serve that interest. Shrink Mo., 71 F.3d at 1426; see also RNC, 487 F. Supp. at 285 ("Where compelling governmental interests exist, Congress' power to place reasonable conditions upon expenditures of public funds, even where they affect the exercise of First Amendment rights, has been recognized."). In this case, the State seeks to promote a reduction in the possibility for corruption that may arise from large campaign contributions and a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning. It is well settled that these governmental interests are compelling. See Shrink Mo., 71 F.3d at 1426 ("the state's interest in reducing corruption and its related concerns constitute a compelling state interest"); RNC, 487 F. Supp. at 285 (curbing possibility of corruption from large campaign contributions and reducing candidate time spent raising campaign funds are compelling interests); see also Carver, 72 F.3d at 638 (8th Cir. 1995) (noting that Buckley held that limiting the reality or perception of corruption due to large campaign contributions was compelling interest). Indeed, given the importance of these interests, the State has a compelling interest in stimulating candidate participation in its public financing scheme. Vote Choice, 4 F.3d at 39; see also Wilkinson, 876 F. Supp. at 928 ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations which are designed to

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governmental regulations involving campaign contributions. (See State's Br. at 40.) However, we recently held, after carefully reviewing Buckley, that strict scrutiny is the appropriate standard for analyzing regulations of campaign contributions. Carver v. Nixon, 72 F.3d 633, 637-38 (8th Cir. 1995), cert. denied, 116 S. Ct. 2579 (1996).

promote political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts.").

Thus, the constitutional validity of the State's scheme turns on whether the challenged provisions are narrowly tailored to serve these interests. We believe that each of the challenged provisions satisfies this test. Initially, we observe that the State's basic public financing program of providing a public subsidy in exchange for the candidate's agreement to abide by expenditure limits is consistent with campaign financing plans which courts have long held satisfy strict scrutiny. See RNC, 487 F. Supp. at 285-87; Vote Choice, 4 F.3d at 39-40.

The expenditure limitation waiver also satisfies strict scrutiny. As we noted above, this provision removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent. Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program, with its binding limitation on campaign expenditures, because of the candidates' concerns of placing their candidacy at an insurmountable disadvantage.[9]

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[9] This is especially true in a system like Minnesota's, in which the publicly financed candidate will receive a public subsidy of no more than 50 percent of the expenditure limits. Thus, the candidates, even if publicly funded, still have certain private fund raising needs.

Indeed, the Appellants seem to have acknowledged as much in their memorandum in support of their motion for summary judgment, where they stated that the expenditure limitation waiver

> might be seen as simply an attempt to protect those who agree to limits. If the limits stayed on no matter what level of spending the opponent engaged in, those who agreed to limits would be at a severe competitive disadvantage in those cases.

The State simply sought to alleviate this concern by permitting the candidate who enrolled in public financing to disregard the expenditure limits if his opponent does not limit campaign spending. Finally, by allowing the publicly financed candidate to retain the public subsidy, the State simply seeks to reward those who agreed to limit campaign expenditures and do so until their opponent has received or spent private money equal to what the maximum direct state subsidy is. Accordingly, we have little difficulty concluding that the expenditure limitations waiver is narrowly tailored to serve the State's interests. See Wilkinson, 876 F. Supp. at 928 (holding similar provision narrowly tailored to serve compelling governmental interest). See also Vote Choice, 4 F.3d at 39 (holding cap gap, which increased likelihood of participation in public funding scheme, narrowly tailored to serve compelling governmental interest).

We likewise conclude that the contribution refund is narrowly tailored to serve the State's interests. As we noted above, it is in substance a public subsidy provided to the participating candidate, the amount of which is directly related to the measure of popular support enjoyed by that candidate. Such a system has previously been upheld. See Bang v. Chase, 442 F. Supp. 758, 766 (D. Minn. 1977) (three-judge court) (holding valid a Minnesota tax checkoff system for political party which tied amount of subsidy to measure of popular support), aff'd, 436 U.S. 941 (1978). The State reasonably could conclude that this additional form of public subsidy will encourage candidate participation because

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> Candidates who agreed to limit spending would soon be eliminated by the equivalent of natural selection. The legislature could reasonably have concluded that both of these features were essential to give the new system of spending limits a fair chance to succeed.

(Appellants' Addend. at 32 (quoting Appellants' mem. in supp. of mot. for summ. j. at 9).)

candidates will believe that they will be able to draw campaign contributions from a broader array of the citizenry when citizens are informed that they may obtain a refund of up to $50 for contributions made to participating candidates. Again, this is especially important in a financing scheme like the State's, where the candidates must raise at least 50 percent of their campaign funding from private donors. Thus, even with the direct public subsidy, the participating candidate will have significant fundraising needs.[10]

The Appellants contend that the contribution refund is not narrowly tailored because it is not provided on a neutral basis, that is, only contributions made to publicly financed candidates are refundable. The Appellants misapprehend the nature and purpose of a campaign financing scheme. "The state need not be completely neutral on the matter of public financing of elections." Vote Choice, 4 F.3d at 39. Fundamentally, a public financing scheme is designed to afford a participating candidate certain benefits in exchange for that candidate's agreement to abide by certain restrictions. That the candidate's nonparticipating opponent is not afforded the same benefits misses the point: If the benefits, here the contribution refund, were conferred upon all candidates, participating and nonparticipating, there would be no incentive to participate, and the State's goals of decreasing the chances of corruption and freeing up more of the candidates' time for campaigning would be frustrated. Thus, any favoritism enjoyed by the publicly financed candidate through the contribution refund subsidy is simply a permissible byproduct of the campaign

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[10] The district court determined that the contribution refund was constitutionally permissible as applied to candidates as well as contributors. Neither of the Appellants has made any showing or argument that their First Amendment rights as campaign contributors have been adversely impacted because of the refund provision. Accordingly, we confine our analysis to the effect upon the Appellants' rights as political candidates.

financing process. See RNC, 487 F. Supp. at 285 ("If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated.").[11]

The Appellants contend that the contribution refund is not necessary to achieve additional candidate participation, citing Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995), where we held that Minnesota's independent expenditure provision was not narrowly tailored for that very reason.[12] The independent expenditure provision assailed in Day, however, bore a strikingly different pedigree than the contribution refund at issue here. In Day, Minnesota sought to justify the independent expenditure provision on the basis that it was designed to encourage candidate participation in the public financing scheme. Id. at 1361. We rejected this argument as specious because the purported interest, "no matter how compelling in the abstract, is not legitimate" since candidate participation in the public financing scheme was approaching 100 percent when the challenged provision was enacted. Id.; see also id. ("One hardly could be faulted for concluding that this 'compelling' state interest was contrived for the purposes of this litigation.").

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[11] We also reject the Appellants' claim that the language of the refund receipt form puts the State's imprimatur on publicly funded candidates. The receipt merely informs the contributor in innocuous language that the candidate has agreed to abide by certain campaign expenditure limits and that the contributor may obtain a refund on any contribution to that candidate.

[12] The independent expenditure provision at issue in Day operated to increase the expenditure limit for a publicly financed candidate in an amount expended by a political committee or political fund either advocating the candidate's defeat or in support of the candidate's opponent. For example, assuming candidate X is publicly funded and he is opposed by candidate Y, when a political committee or fund expends $1000 in support of Y or in opposition to X, candidate X's expenditure limits increase by $1,000.

By contrast, the contribution refund at issue here, or a functional equivalent tax credit, has been part of the State's public campaign financing plan from almost its inception. The State enacted its present public financing program in 1976 and in 1978 created a tax credit for contributions made to participating candidates. The tax credit became the present tax refund in 1991, and with the exception of a three-year hiatus (1987-1990), the tax credit/refund has been in effect since 1978. The State submits, and the Appellants have presented no evidence to the contrary, that this concept has played an integral role in attaining the almost 100 percent candidate participation in its program. Thus, the circumstances surrounding the enactment of the contribution refund make Day inapposite.

In sum, we conclude that the expenditure limitation waiver and the contribution refund are each tailored in a sufficiently narrow manner to serve the compelling government interests the State has identified. Therefore, even if the challenged provisions somehow burden the Appellants' First Amendment rights, the provisions pass constitutional muster.

IV.

Finally, the Appellants contend that the campaign provisions at issue unfairly discriminate against challengers because, all other things being equal, an incumbent has greater name recognition and fundraising capability than a challenger. Although the constitutional basis upon which Appellants' rest this contention is not entirely clear, in essence it seems to be that the provisions are biased in favor of an incumbent because they fail to place a challenger on an equal footing with the incumbent and are thereby coercive with respect to challengers.

The Appellants contend that the present statute is designed to make it more difficult for a challenger to mount a credible campaign against an incumbent, thus claiming that the Minnesota legislature intended to discriminate against challengers. As support for this argument, they focus on the change in the statute which permits any nonparticipating opponent to trigger the waiver for a participating candidate, in contrast to the prior expenditure waiver wherein only a major-party candidate could trigger the waiver. The Appellants contend that by eliminating this loophole, the State has eliminated the only realistic method by which a challenger can run a credible campaign: by running as a nonparticipating, privately-financed, independent candidate. Before the statute was amended, an independent challenger, i.e., one not a major-party candidate, could raise an unlimited amount of money and make an unlimited amount of campaign expenditures, and his publicly-financed incumbent opponent would still be bound to the expenditure limits.

The Appellants offer the comments of a long-time incumbent member of the Minnesota House of Representatives as support for their argument that, by enacting the 1996 amendment, the Minnesota legislature sought to discriminate against challengers. This legislator stated her belief that the amendment was necessary to correct a circumstance that she had personally encountered in her previous election campaign: her independent, privately-financed, non-major-party opponent was able to spend an unlimited amount on the campaign while, because of the major-party clause, she was still bound by the expenditure limits applicable to her office as a publicly financed candidate. This legislator went on to state that she was a member of the conference committee that sponsored the previous expenditure limitation waiver and that it was not the intent of the sponsors of the previous bill to create the situation she encountered in her campaign; therefore, she argued that the amendment should be adopted to make the

triggering act applicable to all candidates. The Appellants argue that this illustrates the invidious anti-challenger intent behind the enactment of the amendment. There are, however, numerous flaws in the argument.

First, as we noted above, we are not inclined to impute the statements of an individual legislator concerning the purpose underlying a particular piece of legislation to the entire legislative body. Second, even if we were, these statements do not illustrate that the members of the Minnesota legislature sought, by enacting the amendment, to make it difficult for a challenger to mount a credible challenge. The amendment simply eliminated a loophole in the expenditure limitation waiver, the effect of which the prior legislature did not envision. It is, quite simply, nothing more than a curative act. A statute which makes its requirements applicable to all candidates, regardless of party affiliation, can hardly be deemed discriminatory. We cannot identify any discriminatory purpose in this legislator's statements, or in the Minnesota legislature in general, as the reason for the enactment of the 1996 amendment.

As the RNC court aptly observed, in every race for elected office one candidate possesses certain advantages over his opponent, regardless of whether the campaigns are publicly or privately funded, and that it is inconsistent with the purposes underlying a public campaign financing program to attempt to eliminate this discrepancy. 487 F. Supp. at 285-87. Further, the Appellants have presented no persuasive evidence that the Minnesota legislature was motivated by a discriminatory purpose against challengers when it enacted these provisions, which on their face apply evenhandedly to all candidates for a particular public office. See Buckley, 424 U.S. at 31 ("Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.").

Finally, the Appellants fail to acknowledge the ways that the State's program actually operates to the benefit of challengers, rather than to their detriment. For instance, in a situation where the challenger enrolls in the State's financing system, an incumbent opponent, who the Appellants aver possesses greater name recognition and fundraising ability, is confronted with the choice of whether to enroll in the State's public financing plan or opt for private funding for the campaign. If the incumbent enrolls in the State's public financing plan, then he is bound by the State's expenditure limits and his alleged advantage in fundraising capacity is diminished significantly.[13] On the other hand, if the incumbent opted in favor of private funding, the publicly financed challenger would be permitted to disregard the expenditure limits and retain the public subsidy once the privately funded incumbent exceeded the triggering levels in either contributions or expenditures. In either situation, significant benefits accrue to the challenger. Moreover, for the challenger who actually possesses no name recognition or fundraising ability, enrollment in the State's plan can be particularly advantageous: Assuming he meets the threshold requirements to be eligible for public funding, the unknown candidate receives a public subsidy simply for agreeing to limit expenditures. See Buckley, 424 U.S. at 107-08 ("candidates with lesser fundraising abilities will gain substantial benefits from matching funds. In addition, one eligibility requirement for matching funds is acceptance of an expenditure ceiling, and candidates with little fundraising ability will be able to increase their spending relative to candidates capable of raising large amounts in private funds."). Finally, the State's program provides an additional benefit for first-time candidates; such a

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[13] The incumbent's alleged advantage would not be reduced to a complete nullity because publicly financed candidates must still raise at least 50 percent of their campaign funding through private means.

candidate is permitted to exceed the specified expenditure limits by 10 percent, presumably to permit the candidate to attempt to close any name recognition gap enjoyed by the incumbent. See Minn. Stat. Ann. § 10A.25(2)(c).

Thus, the State's plan cannot in any manner be construed to impermissibly discriminate against challengers.[14]

In sum, we believe that the amended statute does not burden a candidate's First Amendment rights. Even if it does burden the candidate's Free Speech rights, it survives strict scrutiny, and it does not impermissibly discriminate against challengers.

V.

We have examined the remaining issues and subissues raised by the Appellants and have determined that they lack

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[14] We also decline to consider the Appellants' argument that Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312 (9th Cir.), cert. denied, 505 U.S. 1230 (1992), counsels in favor of a conclusion that the State's scheme favors incumbents. At issue in Service Employees was a California contribution limit that was keyed to fiscal years, rather than an entire election cycle. Id. at 1314-15. The Service Employees court held that such a limitation impermissibly favored incumbents because they were able to receive campaign contributions up to the limits each year in the election cycle, whereas challengers, whom the court suggested typically do not decide to run for office until the year of the election, would only be able to collect contributions for one year. Id. at 1316-21. The Appellants point out that the State in this case similarly calculates its contribution limits on a calendar year, rather than election cycle, basis. However, the Appellants have challenged this element of the State's financing scheme for the first time on appeal. Neither their complaint nor the parties or the district court below mentioned this issue. Thus, this particular argument has been waived. See United States v. One Parcel of Property, 959 F.2d 101, 104 (8th Cir. 1992) (argument not raised in the district court is waived).

merit. For the reasons enumerated above, we affirm the judgment of the district court.

Lay, Circuit Judge, dissenting:

I respectfully dissent.

As the majority recognizes, while this appeal was pending, Minnesota amended a key provision of its campaign finance laws. Prior to the 1996 amendment, the spending limits waiver for publicly financed candidates took effect when that candidate's major party opponent failed to agree by September 1 of an election year to abide by the state's "voluntary" spending limits. See Minn. Stat. §§ 10A.25(10)(b)(i), 10A.322(1)(b) (1994). The 1996 amendment waives the spending limit for a publicly financed candidate if any of her privately financed opponents--major or minor party--has raised or spent more than twenty percent of the spending limit as of ten days before the primary, or more than fifty percent of the spending limit thereafter. See 1996 Minn. Sess. Law Serv. Ch. 459 (S.F. 840), § 2 (West 1996) (amending Minn. Stat. § 10A.25(10)). Notwithstanding this amendment, the plaintiffs still seek prospective injunctive relief as to Minn. Stat. § 10A.25(10)(b) (1994), which no longer exists. It has been repealed. As such, that part of the case is moot. Although both parties argue we can decide this appeal notwithstanding this change in law, this court's subject matter jurisdiction and the exercise of judicial power cannot be controlled by the desires of the parties. See Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject matter jurisdiction upon a federal court.").

As the majority recognizes, this court "must review the District Court's judgment in light of presently existing [state] law, not the law in effect at the time that judgment was

rendered." Fusari v. Steinberg, 419 U.S. 379, 387 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972) (per curiam).

The majority recognizes that the only basis upon which this court should afford review at this time is to allow a challenge to the legality of the state's ongoing attempt to allegedly chill, by whatever means, plaintiff's freedom of speech as represented by the 1996 amendment. Nonetheless, in my judgment, deciding this issue prior to a review by the district court offends jurisprudential principles. At the very best, this court should remand this case to the district court to allow the plaintiffs to amend their complaint and make whatever challenge to the new law they wish to make. See id. at 415.

The Supreme Court has held that a federal court is not deprived of its power when a governmental entity enacts a new law that "disadvantages [the plaintiffs] in the same fundamental way" as the prior law challenged in the complaint. Northeastern Florida Chapter v. City of Jacksonville, 508 U.S. 656, 662 (1993). In such a case, the plaintiff's injury is redressable by "a judicial decree directing the [governmental entity] to discontinue its [challenged] program[.]" See id. at 666 n.5. Such a rule is necessary to prevent a governmental defendant from rendering a case moot "by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." Id. at 662. On the other hand, if a law is "changed substantially," such that the "challenged conduct" by the governmental entity is not likely to reoccur, then the case is moot. Id. at 662 n.3.[15]

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[15] In Northeastern Florida Chapter, the Court held the case was not mooted by the City of Jacksonville's enactment of an amended minority set-aside ordinance. The Court reasoned that although "[t]he new ordinance may disadvantage [the plaintiffs] to a lesser degree than the old one, . . . insofar as it accords preferential treatment to black- and female-owned contractors--and, in particular, insofar as its 'Sheltered

Whether this court should review the current campaign finance scheme (as opposed to the now repealed statute) presents a close question of justiciability. It is my view that the 1996 amendment does not fundamentally alter the burdens on speech arising from the spending limits waiver and the contribution refund. See id. at 662. Further, the amendment appears to be sufficiently clear such that we are not left to speculate as to how the new law will operate in practice. Cf. Fusari, 419 U.S. at 388-89 (expressing uncertainty as to how state will implement amended welfare benefits law enacted in response to lower court decision striking law down as violating due process).

On the other hand, the 1996 amendment has potential constitutional significance, see, e.g., Wilkinson v. Jones, 876 F. Supp. 916, 927 (W.D. Ky. 1995) (finding constitutional significance in the manner in which spending limits waiver is triggered), and thus the amendment cannot be readily characterized as an "insignificant" change in law. See Northeastern Florida Chapter, 508 U.S. at 662. Moreover, as indicated, under the new amendment it is not readily apparent what specific judicial relief the plaintiffs could obtain since the law they challenged in their complaint can no longer be

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Market Plan' is a 'set aside' by another name--it disadvantages them in the same fundamental way." Id. at 662. The Court recognized that the amended city ordinance applied only to African-Americans and females, rather than seven minority groups, and provided flexibility in the manner of preferential treatment on any given city project. Id. at 661. The Court emphasized that one of the programs, the Sheltered Market Plan, was essentially the same as the law challenged in the complaint. Unlike the prior version of the law, the amended ordinance also contained a ten-year sunset provision and identified several present effects of past discrimination which justified the affirmative action in favor of African-Americans and females. See id. at 674 (O'Connor, J., dissenting). The majority concluded such changes were insignificant; the dissent disagreed.

enjoined.[16] In light of these factors, I believe the proper course would be to vacate the district court's judgment and remand the case to the district court for further proceedings. Even if this course is not required by the constitutional limitations on this court's jurisdiction, I favor such a course as a matter of judicial discretion. See Northeastern Florida Chapter, 508 U.S. at 677 (O'Connor, J., dissenting). The district court's analysis of the new law would undoubtedly help to evaluate the constitutional issues before us.[17] Nonetheless,

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[16] In their amended complaint, the plaintiffs asked for a declaration that several provisions of Minnesota's campaign finance laws, including Minn. Stat. § 10A.25(10)(b) ("subdivision 10(b)"), are unconstitutional. J.A. 42. The plaintiffs also sought an injunction against the enforcement of "the unconstitutional sections of Minnesota's public campaign financing system" and "such other and further relief as this court shall deem just and equitable." Id. In light of the 1996 amendment, enjoining subdivision 10(b) would no longer make sense because that section now provides for notification of publicly financed opponents when a privately financed candidate exceeds certain minimal spending or fundraising thresholds. The substance of old subdivision 10(b) is now codified, as substantially amended, in the new subdivision 10(a) of § 10A.25. See Minn. Sess. Law Serv. Ch. 459 (S.F. 840), § 2 (West 1996). It is unclear what the proper relief in this case would be if the state laws were found to be unconstitutional, although some form of meaningful relief could probably be found. See In re Swedeland Dev. Group, Inc., 16 F.3d 552, 560 (3d Cir. 1994) (en banc) ("[W]hen a court can fashion 'some form of meaningful relief,' even if it only partially redresses the grievances of the prevailing party, the appeal is not moot.") (quoting Church of Scientology v. United States, 506 U.S. 9, 12 (1992)). Following the Court's suggestion in Northeastern Florida Chapter, 508 U.S. at 666 n.5, perhaps an injunction against the state's "program" of campaign finance would be proper relief for the plaintiffs. In any event, I would leave this determination to the district court in the first instance. See note 16, infra.

[17] In their letter brief to this court, the plaintiffs argue the amendments make the law more coercive than the prior version of the law because it applies to all privately financed candidates, not just major party candidates who are privately financed. The state has not had an opportunity to respond to this claim and, on the current record, such a

the majority exercises jurisdiction and upholds the amended Minnesota campaign finance laws. I respectfully disagree with this ruling and thus dissent as well on the merits.

Burdens on Speech

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court made it clear that limits on expenditures in election campaigns are generally unconstitutional because they suppress communication "'at the core of our electoral process and of the First Amendment freedoms.'" Id. at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)). The Court found the First Amendment broadly protects political speech to assure the "'unfettered interchange of ideas for the bringing about of political and social changes desired by the people[,]'" id. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)), and that such protection extends even to what some see as excessive campaign spending. As Buckley stated some twenty years ago, "[t]here is nothing invidious, improper, or unhealthy in permitting [campaign] funds to be spent to carry the candidate's message to the electorate." Id. at 56.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails

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claim is difficult to evaluate. Cf. Fusari, 419 U.S. at 385-866, 387 n.12 (reviewing the legislative history and purpose of the amended statute and noting that the Court's review was "largely unassisted by counsel").

> printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19 (footnote omitted). In light of the constitutional protection afforded campaign speech, the Court held that controlling campaign costs was not a legitimate governmental interest.

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people--individually as citizens and candidates and collectively as associations and political committees--who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57.

In upholding the Minnesota campaign finance scheme the majority, with all due respect, fails to evaluate properly these fundamental constitutional principles involved in this case.

The state distinguishes Buckley by arguing that if the state provides a public subsidy, which is voluntarily accepted, then Buckley does not control. As Buckley points out,

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by

> specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id. at 57 n.65 (emphasis added).

The difficulty we face here is that under Minnesota's campaign finance law, once a publicly financed candidate has chosen to accept the limits, she is provided a spending limits waiver, if her opponent chooses to exercise her constitutional right to forgo public financing and exceed the statutorily imposed limit.[18] In the majority's view, the enjoyment of public subsidies (including the contribution refund) and a waiver of the spending limits by a publicly financed candidate is nothing more than an inducement by the state "to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." Ante at 12.

I respectfully submit such an analysis is irrelevant in evaluating the concerns of whether the non-public financed candidate's First Amendment rights are chilled. This case is not about the publicly financed candidate's free speech rights. It is not a matter of balancing benefits with restrictions. Nor is it a question of speech restricted by time, place or manner. The issue is whether a candidate who faces a choice not to

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[18] The spending limits waiver was adopted in 1988. Prior to 1988, publicly financed candidates were bound by the spending limits to which they agreed, regardless of their opponent's actions. See, e.g., Minn. Stat. § 10A.25(10) (1986). The pre- 1988 law was thus consistent with the public financing of Presidential campaigns upheld in Buckley, 424 U.S. at 85-108, and Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), aff'd mem., 445 U.S. 955 (1980) ("RNC").

limit her full access to political speech will be any worse off in choosing to do so. When a candidate voluntarily abandons all the benefits of public subsidies (including the contribution refund) to exercise her constitutional right, it is a voluntary choice.[19] When such a choice is made, however, Minnesota's campaign finance scheme adds disincentives which make a privately financed candidate worse off than she otherwise would be.[20] Her publicly financed opponent, who has chosen to receive a public subsidy, can now keep the public subsidy, obtain the benefit of the contribution refund for all past and future contributions, and spend without limit.[21]

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[19] See RNC, 487 F. Supp. at 283-84 ("Each candidate remains free under the Fund Act, instead of opting for public funding, to attempt through private funding to raise more than the '$20,000,000 plus' public funding limit and to spend any amount of funds raised by private funding, without any ceiling."); cf. Buckley, 424 U.S. at 99 ("[S]ince any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates."); id. at 101 ("Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates.").

[20] To urge that such disincentives are not per se "coercive because they are not inherently penal" is meaningless rhetoric. See ante at 11. The disincentives are invoked as a means to influence directly a candidate's choice (to keep the candidate in line within the spending limit). To call such coercive conduct by any other name does not diminish the effect upon the candidate's choice. The issue is whether a candidate's decision to exercise her constitutional right to free speech has been chilled. When the opponent's spending limit is automatically removed, the opponent's public subsidy retained, and more tax benefits to the opponent's contributors become available, it seems ineluctable to me that the candidate's right has been chilled.

[21] The law even allows the absurd situation where a candidate can wait until her opponent has made a choice to exercise unlimited speech, then agree to the spending limit and receive the public subsidy, but then exceed the limit without penalty and keep the subsidy. In such

With all due respect to the majority's interpretation, it seems plain that Minnesota's current campaign financing scheme, including the spending limits waiver and the retention of the public subsidy, as well as the contribution refund,[22] directly chills the exercise of a privately financed candidate's constitutional right to unfettered political speech.

This court has on two prior occasions recognized the penalizing nature of related provisions of Minnesota's campaign finance laws. First, in Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993), which found similar provisions in Minnesota's congressional campaign finance laws preempted, this court stated that "candidates who do not agree to be bound by the spending limits are penalized because their opponents who have agreed to the limits will still receive public financing, but will not be bound to their agreement." Id. at 877 n.7.[23]

Second, in Day v. Holahan, 34 F.3d 1356, 1359-62 (8th Cir. 1994), cert. denied, 115 S. Ct. 936 (1995), this court struck down a Minnesota law which allowed a publicly financed candidate to exceed her spending limit by the amount of "independent expenditures"[24] against her and receive an

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circumstances, the publicly financed candidate's spending limit is illusory from the outset.

[22] The contribution refund was adopted in 1991. From 1978 to 1987, however, Minnesota provided a tax credit to contributors for contributions up to a certain level, which was substantially similar to the current contribution refund system.

[23] Although this statement may be dicta, as the majority finds, the opinion, written by Judge Magill in which Judge Fagg and Judge Hansen joined, accurately characterizes the penalizing nature of Minnesota's campaign financing scheme.

[24] An independent expenditure was defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate" by an individual, political committee or political fund which

additional direct public subsidy. In Day, the court reasoned that this provision burdened speech because:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.

Id. at 1360. Although there is no additional direct public subsidy in this case,[25] the public subsidy involved in the

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had expended more than $100 on such expenditures. See Day, 34 F.3d at 1359 (citations omitted).

[25] In Wilkinson, which upheld a spending limits waiver against a motion for a preliminary injunction, the district court distinguished Day in part on the basis that additional public subsidies available to a publicly financed candidate facing a privately financed opponent in Kentucky were not "automatic" but "may only be obtained when additional private contributions are raised." 876 F. Supp. at 927. I do not think this distinction is of constitutional significance in this case when the additional private contributions are subsidized, thus enhancing the publicly financed candidate's fundraising ability.

Wilkinson also distinguished Day on the basis that the spending limit waiver took effect when the first dollar of an independent expenditure was made, whereas under Kentucky's campaign financing scheme the spending limits waiver did not occur until a privately financed gubernatorial candidate actually raised or spent in excess of $1.8 million, which provided "a significant amount of unconstrained speech on the issues" before the spending limits waiver came into play. Id. Such a distinction is not applicable in this case. The spending limits waiver here takes effect when the privately financed candidate exceeds minimal spending or fundraising thresholds: 20 percent of the spending limit ten days prior to the primary election or 50 percent of the spending limit thereafter. See 1996 Minn. Sess. Law Serv. Ch. 459 (S.F. 840), § 2 (West 1996). In light of the $21,576 spending limit for state

representative candidates in this case, J.A. 21, these minimal thresholds for triggering the spending limits waiver do not provide for as significant an amount of unconstrained speech on the issues as the $1.8 million available in Wilkinson. Cf. Buckley, 424 U.S. at 20 n.20 (noting that full-page advertisement in metropolitan newspaper in 1975 cost $6,971.04).

Wilkinson further distinguished Day on the basis that a spending limits waiver coupled with additional public subsidies chills an independent organization's free speech but not a candidate's. Specifically, Wilkinson suggested that in Day, an independent organization did not have any choice about whether to act in a manner that would enhance the campaign of the candidate whom it was trying to defeat, whereas in Wilkinson the decision rested "within the privately-financed candidate's complete control" by that candidate's ultimate actions in raising and spending money in excess of $1.8 million. See 876 F. Supp. at 927. Such distinctions are not valid in this case.

First, the privately financed candidate has no genuine control over whether to help her opponent's campaign, because she triggers her opponent's spending limits waiver by exceeding minimal spending or fundraising thresholds. A competitive privately financed candidate would almost certainly need to exceed the minimal thresholds in order to avoid being substantially outspent by the publicly financed candidate. The record does not show any successful privately financed candidates who have spent less than the thresholds. In 1992, average spending by all candidates, publicly and privately financed, exceeded the thresholds that now trigger the spending limits waiver. See J.A. 22. In these circumstances, it is hard to say that the privately financed candidate in Minnesota retains "complete control" over the spending limits waiver. In Wilkinson, by contrast, the privately financed candidates had no fear of being outspent because she retained genuine control until she actually spent or raised in excess of $1.8 million, i.e., the spending limit applicable to publicly financed candidates.

Second, there is no basis for holding that the provisions at issue here will chill an independent organization's free speech but not a candidate's. A candidate's interest in speaking is in winning the election in which she is running; her speech will clearly be chilled if, by speaking, she advances the campaign of her opponent. An organization making an

contribution refund clearly "enhance[s] [the publicly financed] candidate's fund raising ability." See Weber, 995 F.2d at 877 n.7. Furthermore, the indirect public subsidies through the contribution refund are potentially unlimited, and thus may have a greater chilling effect than the limited additional subsidy at issue in Day. Finally, the spending limits in this case will not only be "increased" in an amount equal to one half of the opposing expenditures, as in Day, but will be wholly removed. Thus, the burdens imposed on the core political speech of privately financed candidates in this case are greater than, or at least substantially similar to, the burdens imposed on independent organizations in Day, and cannot adequately be distinguished. In accord with Weber and Day, I find Minnesota's campaign finance scheme burdens a candidate's free speech rights by chilling her decision to increase her political speech by exceeding the spending limits.

Avoiding the fundamental principles of Buckley and the decisions of our court, the majority seeks refuge in the First Circuit opinion in Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993), which upheld a "cap gap" between publicly financed candidates, who may receive up to $2,000 per campaign contribution, and those who choose private financing, who may only receive up to $1,000 per donor. Id. at 37-40. The First Circuit found the scheme constitutional since it offered a relative balance between the benefits given to, and the restrictions placed on, publicly financed candidates.[26] Even under this "rough proportionality"

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independent expenditure, by contrast, may be more willing to risk helping an opponent to some extent by engaging in political speech in order to educate the public and otherwise to advance the organization's larger purposes. Thus, if there is any difference between the chilling effect on the two, the burden on a candidate's speech is greater.

[26] Vote Choice found the "cap gap" was not "impermissibly coercive" in part because the $2,000 limit was not contingent on the opponent's decision to rely on private funding, see 4 F.3d at 38, 37 n.13,

approach, id. at 39, the Minnesota campaign finance scheme must fall. A scheme which wholly releases a publicly financed candidate from the only restriction she must accept to receive public financing in the first place is not roughly proportional.[27]

Compelling State Interest

I also respectfully disagree with the majority's conclusion that the state has shown its law is narrowly tailored to a compelling state interest.

The majority identifies the following state interests that are served by the spending limits waiver: (1) reduce the

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and neither gubernatorial candidate had accepted public funding, which showed that the "cap gap" incentive was not coercive, id. at 39 n.14. The incentives to publicly financed candidates here are contingent on their opponents' decision. The record also does not show any races in which all candidates were privately financed. Thus, important factors in Vote Choice which tended to show the cap gap was not coercive are not present in this case.

[27] Vote Choice, as the majority concedes, did not decide the very issue submitted here, that is, whether a candidate could waive the expenditure limits and retain a public subsidy if opposed by a privately financed candidate. Vote Choice did note, however, that Rhode Island's law provides a spending limits waiver for publicly financed candidates in certain circumstances. 4 F.3d at 30 n.5. This provision of Rhode Island's law, which was not challenged in Vote Choice, provides no support for the majority's holding in this case. Rhode Island's law provides that a publicly financed candidate may exceed the spending limits only when and to the extent that the privately financed candidate exceeds the limits. Id. Further, no additional public subsidies are available to a publicly financed candidate above the $750,000 direct matching funds from the state. See id. at 30. Under Minnesota's law, by contrast, from the moment the general election campaign begins, if a publicly financed candidate faces a privately financed opponent who has spent or raised money in excess of the minimum thresholds, she may raise and spend unlimited funds all of which could potentially come from subsidized individual contributions.

possibility of corruption, (2) diminish the need for fundraising, (3) allow more time for discussing issues, (4) stimulate participation in the public finance scheme, (5) protect candidates who agree to the limits from being substantially outspent by their opponents, and (6) reward candidates who initially agree to limit spending but are nonetheless subsequently released from the limits.

The state's interests in guarding against corruption, reducing the need for fundraising, and allowing more time for discussing issues--which are the classic justifications for campaign finance laws, see Buckley, 424 U.S. at 91; RNC, 487 F. Supp. at 284--are not directly served by the spending limits waiver in any substantial way. In fact, the waiver, by allowing a candidate to raise unlimited private funds, defeats the purposes of the public subsidy because the candidate, once released from the spending limits, is likely to devote more time to fundraising and may develop "unhealthy obligations" to those additional individuals who donate. See id. at 285 ("If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated.").

It is only in an indirect sense that the waiver might support the state's goals of guarding against corruption, reducing the need for fundraising, and allowing more time for discussing issues. The state's theory is, if the spending limits waiver encourages more people to agree to abide by the limits, or forces them to do so, the waiver reduces the need for private fundraising and the potential for corruption. Thus, the state's real interest in the spending limits waiver is to free candidates from fundraising and reduce the possibility of corruption by stimulating participation in its campaign finance program.[28]

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[28] The other interests--protecting candidates from being substantially outspent and rewarding candidates who initially agree to the

Whether stimulating participation in a state's public campaign financing scheme is a compelling state interest in any circumstance is an open question in this circuit. See Day, 34 F.3d at 1361. Assuming, but not agreeing, that stimulating participation in the public finance program is a legitimate state interest, I nonetheless find that under the facts and circumstances of this case, the state's interest in stimulating participation is not a compelling one, and the spending limits waiver and contribution refund are not narrowly tailored to serve that interest. It is settled at least in this circuit that stimulating participation is not a compelling state interest if it is not necessary to actually stimulate such participation. Id. Since 1976, candidate participation rates in Minnesota's public finance program have been as follows:

1976	92%	1986	77%
1978	87%	1988	89%
1980	66%	1990	93%
1982	90%	1992	95%
1984	78%	1994	92%

J.A. 22. The contribution refund (or its tax credit predecessor in effect from 1978 to 1987) did not exist in 1976, 1988, or 1990, when the participation rates were 92, 89, and 93 percent, respectively.[29] Before the enactment of the spending

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limits--are means of stimulating participation in the state's campaign finance program. If the state wanted to reward people who were positively inclined toward spending limits, on that basis alone, in such circumstances the spending limits waiver would constitute impermissible viewpoint discrimination. Moreover, the fact that the state penalizes those who breach the spending limit, absent a waiver, shows the state has no independent interest in a candidate's initial agreement to those limits.

[29] The majority errs in its reasoning that because the tax refund or tax credit is long-standing, and the plaintiffs have not shown otherwise, the tax refund "has played an integral role in attaining the almost 100

limits waiver, participation rates were uniformly above 66 percent and were 92 percent in 1976 and 90 percent in 1982. This record belies the state's claim that the provisions challenged here are necessary to achieve substantial participation in the state's public financing scheme.

The spending limits waiver and contribution refund are also not narrowly tailored to achieve the state's interest with minimal burden on a privately financed candidate's free speech rights. If the state is concerned that publicly financed candidates are "at an insurmountable disadvantage" against privately financed candidates in the absence of these provisions, ante at 18, it seems plain that the state's spending limits are too low. With a limit of $21,576 for candidates for state representative, J.A. 21, a candidate may reasonably feel endangered by the prospect of her opponent spending tens of thousands of dollars more in an aggressive advertising and direct mail campaign. The constitutionally proper means to stimulate participation is not to burden the privately financed candidate's speech, however, but rather to provide the publicly financed candidate with the opportunity for more speech through higher subsidies or higher spending limits, or both. See RNC, 487 F. Supp. at 285 (noting that candidates "will opt for public funding only if, in the candidate's view, it will enhance the candidate's powers of communication and association"); cf. Wilkinson, 876 F. Supp. at 927 (finding that the $1.8 million raised or spent in a gubernatorial campaign in Kentucky before a publicly-funded opponent's spending limit is waived provides "a significant amount of unconstrained speech").

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percent candidate participation in its scheme." Ante at 22. As I have stated, in 1976, before the enactment of the tax credit, the participation rate was 92 percent, and during the three-year hiatus (1987-1990), the participation rates were 89 percent in 1988 and 93 percent in 1990. J.A. 22.

Furthermore, the state could overcome the "insurmountable disadvantage" in a manner with less chilling effect on the free speech rights of privately financed candidates by providing only a partial spending limits waiver or by deferring the waiver of the spending limits until the privately financed candidate has actually exceeded the spending limit. Cf. Vote Choice, 4 F.3d at 30 n.5 (noting that Rhode Island's spending limits waiver, which was not challenged in that case, takes effect only when and to the extent that the privately financed candidate exceeds the limits). Likewise, the contribution refund would stimulate participation and yet have a less chilling effect on a privately financed candidate's speech if there were limits on the amount of indirect public subsidies a candidate could receive through such a program.

Conclusion

The district court declared unconstitutional a provision of Minnesota's campaign finance laws which allowed a publicly financed candidate to receive her privately financed opponent's share of available public funding. See Minn. Stat. § 10A.25(10)(b)(iii) (1994). The state did not appeal this ruling, and in 1996 the legislature repealed this provision. See 1996 Minn. Sess. Law Serv. Ch. 459 (S.F. 840), § 2 (West 1996). I would now also find Minnesota's spending limits waiver for publicly financed candidates unconstitutional. This waiver clearly chills the core political free speech rights of privately financed candidates for state representative, and does so without adequate justification for the burdens imposed on such speech. Furthermore, in light of the spending limits waiver, I would also find the contribution refund unconstitutional because it provides potentially unlimited public support for a public financed candidate and thereby coerces a candidate's

choice as to whether to accept or decline the public financing of her campaign.[30]

For the reasons stated, I dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[30] Under my view of the merits, I would remand this case to the district court to determine how to enjoin the enforcement of the contribution refund and the spending limits waiver under the 1996 amendment, see note 2, supra, and to determine if other provisions of the state's campaign finance law can remain. This is not to say that those provisions that allow candidates to receive a public subsidy in exchange for a binding agreement to adhere to specified limits standing alone cannot remain. As I have pointed out, if a candidate voluntarily chooses to accept a public subsidy in exchange for an agreement to adhere to specified limits, there is nothing unconstitutional about such a provision as long as it does not serve to chill the voluntary choice of the opposing candidate to decline public financing and exceed the spending limits. See Buckley, 424 U.S. at 57 n.65. Nonetheless, I would have the district court determine in the first instance how the spending limits waiver and contribution refund can be enjoined, and whether they are severable from the remaining provisions of Minnesota's campaign finance act.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Patrick Rosenstiel
and Christopher Longley,

Plaintiffs,

vs.

Civil No. 3-94-1008
MEMORANDUM OPINION AND ORDER

John Holahan, Jr., in his capacity as Chair of the Ethical Practices Board, or his successor,

Defendant.

Harlan Goulett, Stoneking & Goulett, Minneapolis, Minnesota, for Plaintiffs.

Richard S. Slowes, Minnesota Attorney General's Office, St. Paul, Minnesota, for Defendant.

Introduction

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 by two candidates for the Minnesota House of Representatives. Plaintiffs challenge recent amendments to the Minnesota Ethics in Government

Act ("Minnesota Campaign Act" or "Campaign Act"), Minnesota Statutes sections 10A.01-10A.51 (1994), which establishes public subsidies for legislative candidates and set campaign expenditure limits for those candidates who accept the subsidies. Plaintiffs claim these provisions violate their First Amendment rights to engage in political speech. Plaintiffs moved for a preliminary injunction prior to Minnesota's 1994 general election. This motion was denied. (See Mem. Op. and Order dated Sept. 30, 1994, Doc. No. 13.) This matter is currently before the Court on Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion will be granted in part and denied in part.

Background

A. Parties

Plaintiff Christopher Longley ("Longley") was a candidate for the Minnesota House of Representatives in District 64A in St. Paul. Longley lost in the 1994 general election. Plaintiff Patrick Rosenstiel ("Rosenstiel") was a candidate for the Independent-Republican Party endorsement for the Minnesota House of Representatives in District 59B in Minneapolis. Rosenstiel lost in the 1994 Independent-Republican primary election. Longley and Rosenstiel have both indicated they intend to run for office again in the next election.

Named party defendant in this matter is John Holahan, Jr., chair of the Minnesota Ethical Practices Board ("Ethical Practices Board"). The Ethical Practices Board is responsible for the administration, interpretation and enforcement of the Minnesota Campaign Act.

B. Minnesota Campaign Act

The Minnesota Campaign Act establishes guidelines for financing Minnesota political campaigns and provides public subsidies to candidates who agree to limit campaign expenditures. In order to be eligible for a subsidy, a candidate must sign and file with the Ethical Practices Board a written agreement to adhere to the campaign spending limits set out in Minnesota Statutes section 10A.25, subd. 2. A candidate must also independently raise contributions in an amount equal to pre-established matching fund requirements. Minn. Stat. § 10A.323. The amount a candidate is required to "match" depends upon the state office sought, and the total public subsidy a candidate receives may not exceed 50% of the expenditure limit applicable to that office. Id.; Minn. Stat. § 10A.31, subd. 7. A candidate who loses in the primary election or who is unopposed in both the primary election and the general election is not eligible to receive the subsidy. Minn. Stat. § 10A.31, subds. 6, 12. The subsidy is distributed after the results of the primary election are determined. Minn. Stat. § 10A.31, subds. 6.

Minnesota first enacted legislation providing subsidies for state election campaigns in 1974. 1974 Minn. Laws ch. 470, §§ 30-32. In 1976, the campaign financing legislation was amended to limit public subsidies to candidates who agreed to campaign spending limits. 1976 Minn. Laws ch. 307 § 34. In 1993, the Minnesota Legislature amended the eligibility and subsidy distribution requirements contained in the Act. Plaintiffs challenge several of these new provisions, as well as several portions of the original Act.

First, Plaintiffs challenge the requirements contained in section 10A.25, subd. 10(b). Section 10A.25 establishes the specific limits for campaign expenditures. In order to receive a public campaign subsidy, a candidate must agree to limit campaign expenditures to these amounts. Minn. Stat.

§10A.322. Pursuant to section 10A.25, subd. 10(b), if a candidate agrees to adhere to the preestablished spending limits, but that candidate's opponent does not agree to the limits, then the following occurs: (1) the candidate who agreed is no longer bound by the spending limits; (2) the candidate who agreed is still eligible to receive the public subsidy; and (3) the candidate who agreed receives all, or a portion of, his or her opponent's public subsidy. Subsections (1) and (2) were enacted in 1988; subsection (3) was enacted May 15, 1993.

Second, plaintiffs challenge section 10A.28, entitled "Penalty for Exceeding Limits." This section imposes a civil fine for candidates who formally agree to be bound by the spending limits, but later breach that agreement by making expenditures or accepting contributions in excess of the applicable spending limit. Minn. Stat. § 10A.28, subd. 1 and 2. Pursuant to this provision, a candidate who breaches the agreement is subject to a civil fine of up to four times the amount by which the expenditure or contribution exceeded the limit. This section was not part of the 1993 amendments, but has been in place since at least 1988.

Third, plaintiffs challenge section 10A.31, entitled "Designation of Income Tax Payments." This section creates a State Elections Campaign Fund, which consists of two separate accounts: (1) the political party account, and (2) the general account. Minn. Stat. § 10A.31. These two accounts provide the funding for the public subsidies. Under this scheme, a Minnesota taxpayer may designate on his or her income tax or property tax refund return that $5.00 be paid into the State Elections Campaign Fund; the taxpayer may further designate that money be paid into either the account of a specific political party or into the general account. Minn. Stat. § 10A.31, subds. 1 and 2. The general account also contains money appropriated to the State Campaign Fund from the state's general fund. Minn. Stat. § 10A.31, subd.

4(b). Only those candidates who agree to be bound to spending limits are eligible for these funds. Minn. Stat. § 10A.31, subd. 6; Minn. Stat. § 10A.322, subd. 1.

Fourth, plaintiffs challenge section 10A.322. This section sets out the specific requirements for executing the public subsidy agreements. As noted, candidates are not eligible for the campaign subsidy unless they formally execute this agreement. This section regulates the content, scope, duration, and procedural standards for these agreements. The 1993 Amendments made several minor changes to this section. Plaintiffs challenge § 10A.322 in its entirety.

Fifth, plaintiffs challenge provisions of the state's refund contributions system. Minn. Stat. § 290.06, subd. 23. Although not in the Campaign Act itself, the provisions of the refund system are derived from the Campaign Act. Under this refund system, a taxpayer may claim a refund for certain contributions to a candidate or candidates and to any political party made in the calendar year. The refund is not available for contributions to candidates who have not agreed to be bound by the campaign expenditure limits. Minn. Stat. § 290.06, subd. 23(b). This provision has been in place since 1991.[1] 1990 Minn. Laws ch. 608, art.3, § 28. Plaintiffs seek to enjoin the entire refund system provided in section 290.06, subd. 23 and to have the same declared unconstitutional.

Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331 and 2201.

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[1] Minnesota first enacted legislation providing for an income tax credit for political contributions to candidates who agreed to the statutory spending cap in 1978. 1978 Minn. Laws ch. 463, § 108. This tax credit was repealed in 1987, 1987 Minn Laws ch. 268, art. 1, §§ 125 and 127, re-enacted in 1990, 1990 Minn. Laws ch. 608, art. 3, § 28. In 1991, the tax credit was converted to a tax refund. 1991 Minn. Laws ch. 291, art. 6, § 24.

Discussion

A. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Under that Rule:

> [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). Although this matter is formally before the Court on Plaintiffs' Motion for Summary Judgment, the parties have agreed that there are no issues of material fact in dispute in this case and have submitted the matter to the Court for final resolution on the merits.

B. Analysis

Plaintiffs claim that Minnesota Statutes sections 290.06, subd. 23; 10A.25, subd. 10(b)(i), (ii) and (iii); 10A.28, subds. (1) and (2); 10A.31; and 10A.322 violate their First Amendment rights by coercing them to restrict their political fund-raising, expenditures and expression.[2] They seek to have

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[2] In their Amended Complaint, Plaintiffs also asserted a cause of action under Article I, Section 3 of the Minnesota Constitution. This section provides that "[t]he liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects,

these provisions, as well as the entire state public campaign finance scheme, declared unconstitutional.

The Supreme Court has specifically considered the constitutionality of campaign subsidies and campaign expenditure limitations. In Buckley v. Valeo, the Supreme Court held that mandatory limits on campaign expenditures violate the First Amendment, but that campaign subsidies which condition public financing on campaign expenditure limits are constitutional. 424 U.S. 1, 96 S. Ct. 612 (1976). The Court explained that:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fund-raising and accept public finding.

Id. at 57 n.65, 96 S. Ct. at 653 n.65. The Supreme Court has also upheld a voluntary system of campaign financing against direct First Amendment attack. Republican Nat'l Comm. v. Federal Election Comm'n, 445 U.S. 955, 100 S.Ct. 1939, aff'g mem. 487 F.Supp. 280 (S.D.N.Y 1980); see also Vote Choice Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993) (holding that a state funding system whereby gubernatorial candidates received public campaign funds in exchange for agreement to campaign spending cap did not violate the First Amendment).

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being responsible for the abuse of such right." Minn. Const. art. I, § 3. Plaintiffs do not contend that the protection afforded under the Minnesota Constitution is distinguishable from that afforded under the First Amendment, and in fact have not discussed or referred to their state constitutional claim in any of the materials provided to the Court. The Court will accordingly confine its analysis to the Plaintiffs' federal claim.

As the Court has previously recognized, several of the provisions the Plaintiffs attack are compatible with the traditional campaign reform systems sanctioned in Buckley and its progeny. (See Mem. Op. and Order dated Sept. 30, 1994, Doc. No. 13.) Section 10A.322 sets out the procedural requirements for the expenditure agreements. Section 10A.31 creates the funds from which the public subsidies are drawn. Section 10A.28 authorizes a civil fine for those candidates who formally agree to limit expenditures in exchange for public funds, but then breach that agreement. Sections 10A.25(b)(i) and (ii) of the Act provide that a candidate whose opponent does not agree to the campaign spending cap remains eligible for the subsidy, but need not limit her campaign expenditure to the ceiling established in the Act. Although Plaintiffs maintain that Minnesota's entire campaign finance scheme, including these provisions, is "coercive," Plaintiffs have provided no authority to demonstrate these particular provisions are unconstitutional.[3]

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[3] Indeed, in their Motion, Plaintiffs claim to have challenged the following four features of the Campaign Act, not the panoply of provisions alleged in their Complaint: (1) Minn. Stat. § 10A.25, subd. 10(b)(i), (2) Minn. Stat. § 10A.25, subd. 10(b)(ii), (3) Minn. Stat. § 10A.25, subd. 10(b)(iii), and (4) Minn. Stat. § 290.06, subd. 23. Plaintiffs further state:

> Although Plaintiffs continue to urge that all four features of the law should be stricken as coercive, plaintiffs also agree with this court's earlier, less sweeping analysis. This first provision, providing public funding in exchange for agreement to spending limits, is simply an offer of public funds in return for the candidate's agreement to stay under the limits. The second provision, allowing the complying candidate to exceed the limits if the opposition does so might be seen as simply an attempt to protect those who agree to limits. If the limits stayed on no matter what level of spending the opponent engaged in, those who agreed to limits would be at a severe competitive disadvantage in those cases. Candidates who agreed to limit spending would soon be eliminated by the equivalent of natural selection. The legislature could reasonably have concluded that both of these features were

Moreover, these provisions are analogous to the campaign financing scheme upheld in Vote Choice. 4 F.3d at 30 n.5. Vote Choice specifically held that Rhode Island's program for public financing did not violate the First Amendment. Like the Minnesota scheme, the Rhode Island scheme provided public matching funds for candidates who agreed to campaign expenditure limits; required candidates to execute an agreement pledging to comply with the limitations on contributions and expenditures; imposed a civil penalty for candidates who agreed to the campaign expenditure limits in exchange for the public subsidy, but then breached that agreement; and permitted a publicly financed candidate to exceed campaign expenditure limits if a privately funded opponent exceeded them.[4] After reviewing the analogous Minnesota provisions, the Court concludes they are permissible and traditional facets of sanctioned campaign finance schemes.

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essential to give the new system of spending limits a fair chance to succeed.

(Pls.' Mem. in Supp. of Mot. for Summ. J. at 9 (emphasis added).)

[4] In addition to Vote Choice, at least one other federal court has specifically considered the constitutionally of campaign reform legislation which permits publicly funded candidates to exceed campaign spending caps in order to compete with privately funded candidates. In Wilkinson v. Jones, No. CIV.A.94-0664-L(S), 1995 WL 60730 (W.D. Ky. Jan. 27, 1995), a Kentucky gubernatorial candidate claimed that a provision in the Kentucky campaign financing scheme which released a publicly funded candidate from campaign spending limitations when a non-participating candidate exceeded them violated his First Amendment right to engage in political speech. In denying his motion for a preliminary injunction, the court explained that this provision "protects a publicly-funded candidate from being grossly outspent by lucrative privately-financed campaigns" and "prevents the publicly-funded candidate from being penalized for deciding to accept public funds." Id. at *11. The court concluded that it was "unlikely" the plaintiff would succeed on the merits of his First Amendment claim. Id.

The Minnesota Campaign Act does, however, contain several provisions which appear to be unique to the Minnesota scheme. Plaintiffs have focused their analysis on two of these provisions: (1) section 10A.25, subd. 10(b)(iii) and (2) section 290.06, subd. 23. Section 10A.25, subd. 10(b)(iii) provides that when a candidate chooses to participate in the subsidy program, and that candidate's opponent does not, the complying candidate will receive his opponent's share of the fund. Section 290.06, subd. 23 provides for a tax refund for certain contributions made to candidates who participate in the subsidy program. The Court will consider each of these in turn.

1. Section 10A.25 Subdivision 10(B) (iii)

As the Supreme Court made clear in Buckley, campaign expenditures and contributions are forms of protected political speech. See Buckley, 424 U.S. at 14, 96 S. Ct. at 633 ("contribution and expenditure limitations operate in area of the most fundamental First Amendment activities . . . [t]he First Amendment affords the broadest protection to such political expression"). Candidates have a protected right to accept private political funds and make campaign expenditures, and law which restrict a candidate's ability to accept contributions and make such expenditures are subject to First Amendment scrutiny.[5]

[5] After determining that campaign expenditures were a form of protected political speech, Buckley explained that "[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known." Buckley, 424 U.S. at 52, 96 S. Ct. at 651.

In this case, section 10A.25, subd. 10(b)(iii) chills a candidate's ability to engage in this form of protected speech. Under this section, the state doubles the amount of funds available for a non-participating candidate's opponent to spend on her campaign -- funds which otherwise are not available -- based on the candidate's exercise of a protected right to accept unlimited private funding in lieu of the public subsidy. This is significantly different than the system condoned in Buckley. Here, the state takes a direct, partisan posture in the campaign and functionally advocates a candidate's defeat based on her exercise of her First Amendment right to receive and expend funds without the state restrictions. Knowledge that a candidate's opposition will have their campaign coffers doubled if one does not agree to participate in the program manifestly chills a candidate's willingness to exercise this protected First Amendment right.[6]

Having concluded that Section 10A.25, subd. 10(b)(iii) restricts protected speech, the Court must determine whether this restriction is justified by a sufficiently important state interest. See Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994), cert denied, __ U.S. __, 115 S. Ct. 936 (1995). If a statute's restriction of free speech is content-neutral, the law will survive First Amendment attack only if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First

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[6] In upholding a provision in the Kentucky campaign reform legislation which released a subsidized candidate from expenditure limits when an opponent exceeded them, the court in Wilkinson specifically relied upon the fact that the state did not seek "to forcibly equalize the contest by directly subsidizing the opposition" but "merely expand[ed] the breadth of the contest, permitting but not requiring the publicly-funded candidate to respond to the additional speech in which the privately-funded candidate has chosen to engage." Wilkinson v. Jones, No. CIV.A.94-0664-L(S), 1995 WL 60730 at *10 (W.D. Ky. Jan. 27, 1995).

Amendment freedoms is no greater than is essential to the furtherance of that interest." Turner Broadcasting Sys., Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445, 2469 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)). Alternatively, if a statute's restriction is content-based, the law will be unconstitutional unless the state can show it is "necessary to serve a compelling governmental interest and it is narrowly drawn to serve that end." Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1988).

In this case, the Court need not determine whether the restriction imposed under section 10A.2d, subd. 10(b)(iii) is content-based or content-neutral. This restriction does not satisfy the scrutiny imposed under either standard. The Eighth Circuit has provided specific guidance on this issue. In Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), the court considered the constitutionality of several 1993 amendments to the Minnesota Campaign Act and held that section 10A.25, subd. 13, under which the state increased a candidate's subsidy and spending cap if "independent expenditures"[7] were made in support of the candidate's opponent, violated the First Amendment. Day presumed that the state's interest in the campaign scheme was "compelling," but concluded that this provision was unconstitutional. Id. at 1361-62.

In Day, the state interest proffered to justify the infringement of First Amendment rights was to encourage participation in the state's campaign finance scheme. Day

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[7] An "independent expenditure" is defined in the Campaign Act as:

> an expenditure expressly advocating the election or defeat of a clearly identified candidate, which expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate.

Minn. Stat. § 10A.01, subd. 10b.

found that this state interest did not justify the additional First Amendment burdens imposed by the 1993 amendments. In finding section 10A.25, subd. 13 unconstitutional, Day considered the participation rates in the campaign scheme prior to the 1993 Amendments. The court recognized that the participation rate in the program was 97% in 1992 -- prior to the enactment of section 10.25, subd.13 -- and explained that "[c]learly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign laws were passed in 1993." Day 34 F.3d at 1361. Day held that the state's interest in increasing participation in the campaign scheme did not justify additional burdens on First Amendment rights. Id. at 1361-62. Based on these participation rates, Day explained that "the statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." Id. at 1362 (emphasis added).

Day is applicable here. The candidate participation rates in the campaign scheme, and state interest severed by that scheme, are the same. Under the Day analysis, these factors are not sufficient to warrant additional burdens on First Amendment rights.

The state seeks to distinguish Day, arguing that the figures Day relied upon were not accurate. The state alleges that participation rates have fluctuated, that participation in 1992 was 95% rather than 97%, and that participation in 1994 dropped to 92%. (Def.'s Mem. in Opp'n to Mot. for Summ. J. at 7; McCoy Aff. ¶ 8.)[8] The state's attempt to distinguish Day

[8] The state in this case has provided the following summary of participation rates: 1988 - 89%, 1990 - 93%, 1992 - 95%, and 1994 - 92%. (Def.'s Mem. in Opp'n to Mot. for Summ. J. at 7; McCoy Aff. ¶ 8.) In Day the figures provided were as follows: 1988 - 89%, 1990 - 96%, and 1992 - 97%. Day, 34 F.3d at 1361.

on the basis of these purportedly new figures is not persuasive. First, there is no indication that Day would have upheld the statute had these marginally different figures been available. To the contrary, rather than relying on the specific figures provided by the state, the court explained:

> Because the statistics for the three years were for different groups of candidates, it is not possible to compare the figures directly. Nevertheless, there is no argument from the state contesting the proposition that participation in the public campaign financing scheme is very high, nearing 100%.

Day, 34 F.3d at 1361 n.5.

Moreover, assuming arguendo that this difference in figures is significant -- a proposition which this Court questions -- the state's figures belie their claims. A content-neutral restriction on free speech will be upheld only if the state demonstrates the restriction "is no greater than is essential" to the furtherance of the state's interest. Turner Broadcasting Says., Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445, 2469 (1994) (quoting United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)). In this case, the restriction resulting from section 10A.25(b)(iii) is clearly not "essential" to the efficacy of the state finance system; with section 10A.25(b)(iii) in place, participation in the state subsidy program decreased from 95% to 92%.

Having reviewed the Eighth Circuit's analysis in Day, and the arguments offered by the state, the Court concludes that section 10A.25(b)(iii) is unconstitutional. Although the state may encourage candidates to voluntarily limit campaign expenditures, a state may not take a partisan role in the campaign to advocate the defeat of those candidates who exercise their right not to participate in the program. This action infringes upon protected speech "in an area of the most

fundamental First Amendment activities" which is afforded the "broadest protection." Buckley, 424 U.S. at 14, 96 S. Ct. at 632. The state has not met its burden to show this restriction is justified.[9]

2. Section 290.06, Subdivision 23

Section 290.06, subd. 23 authorizes a tax refund for certain campaign contributions. Under this section, a taxpayer may claim a refund equal to the amount of the taxpayer's contribution to a candidate or candidates and to any political party made in the calendar year. The maximum refund is limited to $50 for an individual or $100 for a married couple filing jointly. The refund is not available for contributions to candidates who have not agreed to be bound by the Campaign Act's expenditure limits. Minn. Stat. §290.06, subd. 23(b). Plaintiffs claim this provision violates the First Amendment. In order to assess this claim, the Court must consider whether

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[9] Although the Court has considered section 10A.25, subd. 10(b)(iii) directly under a First Amendment analysis, the Court's findings logically follow from Buckley and Day. Buckley held that limitations on (1) independent campaign expenditures or (2) campaign expenditures authorized by the candidate were unconstitutional. The statute at issue in Day related to the first portion of the Buckley decision. Day held that a process whereby the state increased an opponent's subsidy when a person exercised the protected right to make independent expenditures violated the First Amendment. The issue in this case relates to the second portion of the Buckley decision. However, the same process indicted in Day is employed under section 10A.25, subd. 10(b)(iii). Under this section, an opponent's subsidy is increased when the protected right to make expenditures is exercised. There is no indication in Buckley, Day, or First Amendment jurisprudence that a candidate's right to make expenditures should be entitled to any less protection than that afforded to independent speakers. Indeed, this jurisprudence suggests that the candidate's right to make expenditures is entitled to greater protection. See note 5, supra.

this provision infringes upon the First Amendment rights of (1) the contributors or (2) the candidates.

In denying Plaintiffs' Motion for a Preliminary Injunction, the Court opined that the refund scheme may infringe upon the rights of contributors because contributors may be less likely to donate to candidates who have not agreed to the spending limits, and consequently this section may chill their right to make campaign contributions. (Mem. Op. and Order at 12.) However, upon a further analysis and a careful review of the nature of campaign contributions, the Court finds that a contributor's right to make campaign contributions is not violated by this provision.

The Supreme Court has differentiated between campaign expenditures and campaign contributions. A state may not limit the amount of money spent on a campaign. Buckley, 424 U.S. at 29-59, 96 S. Ct. 644-654. The state may, however, limit the amount of money a person is allowed to contribute. Id. at 23-38, 96 S. Ct. at 637-644. In making this distinction, the Supreme Court explained that the expressive competent of a campaign contribution "rests solely on the undifferentiated, symbolic act of contributing" and not on the size of the contribution. Id. at 21, 96 S. Ct. at 636. The Court also explained that "[w]hile contributions may result in political expression, if spent by a candidate or [others], the transformation of contributions into political debate involves speech by someone other than the contributor." Id. Thus a limitation on the amount of money a person may give to a candidate is constitutionally permissible because "it permits the symbolic expression of support evidenced by a contribution, but does not in any way infringe the contributor's freedom to discuss the candidates and issues." Id., 96 S. Ct. at 636.

Based upon this distinction, it is apparent that section 290.06, subd. 23 does not violate a contributor's right to make contributions. This section does not penalize a person for making a contribution to a non-participating candidate. This

distinguishes the purported chilling effect of the refund provision from the chilling effect of section 10A.25, subd. 10(b)(iii). Section 10A.25, subd. 10(b)(iii) infringes protected speech because the state provides additional funding to an opponent when a candidate exercises the protected right not to participate in the subsidy program. In this case, exercising the right not to participate directly harms a candidate's ability to become elected, and thus chill's a candidate's willingness to exercise that right. Unlike section 10A.25, subd. 10(b)(iii), the refund scheme does not provide additional funding to an opponent or otherwise harm the favored candidate's ability to become elected when a First Amendment right is exercised. A contribution to a non-participating candidate has no effect on an opponent's campaign. Instead, the only "chilling" effect of the refund scheme is a result of a contributor's desire to get a "discount" on her contribution. This, however, is not a protected First Amendment right. The fact that some contributions may be refunded is unrelated to the symbolic act of contributing. As a result, the refund scheme does not infringe upon the First Amendment rights of the contributors.

Whether the refund scheme violates the First Amendment rights of the candidates is a much less complicated issue. Plaintiffs claim the refund scheme is unconstitutional because it places "governmental approval on one side of a contested political race" and is not "neutral." (Pls.' Mem. in Supp. of Mot. for Summ. J. at 10.) Plaintiffs fundamentally fail to appreciate the nature of a governmental subsidy. Subsidized programs are inherently not neutral. They afford a benefit, and any governmental approval associated with that benefit, because they are designed to implement a favored governmental policy. Buckley expressly recognized that the government need not provide campaign subsidies to non-participating candidates. This "inequality" was justified in order to implement the favored policy of limited campaign spending. In doing so, Buckley expressly authorized the

"favoritism" of which the Plaintiffs complain. Moreover, if the subsidy were conferred equally among candidates without regard to the spending limit agreements, the subsidy would cease to provide an incentive to participate in the program, and the purpose of the subsidy would be completely subverted. See Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y.) aff'd 445 U.S. 955, 100 S. Ct. 1939 (1980) ("[i]f a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated"); see also Vote Choice, Inc. v. Distefano, 4 F.3d 26, 39 (1st Cir. 1993) ("[t]he state need not be completely neutral on the matter of public financing of elections").

Tax credits and deductibility for contributions are recognized as a form of government subsidy to the entity or activity to which contributions are made. See, e.g., Buckley, 424 U.S. at 107 n. 146, 96 S. Ct. at 677 n. 146; Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544, 103 S. Ct. 1997, 2000 (1983). In this respect, a tax refund is functionally equivalent to a tax credit, and as Buckley and subsequent cases have made clear, the state may subsidize participating candidates and no others without violating the non-participating candidates' First Amendment rights.[10] Thus Minnesota's choice to subsidize participating candidates

[10] In fact, insofar as the appearance of state "favoritism" to which Plaintiffs object is concerned, the perception of state endorsement is considerably greater under the traditional subsidy programs than under Minnesota's refund scheme; under the refund scheme, the state merely provides a discount to certain contributions, but under a traditional subsidy program, the state directly pays for a portion of a participating candidate's campaign.

through the tax refund scheme established in section 290.06, subd. 23 is permissible.[11]

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[11] The Plaintiffs also object to language used on the refund coupons, claiming that it makes participating candidates appear to be "state-approved." The language in question provides:

> **This receipt can be given to contributors only by Minnesota political parties and by candidates for state office who have signed an agreement to observe the state campaign spending limit law and have registered a Principal Campaign Committee with the Minnesota Ethical Practices Board.**

(McCoy Second Aff., Ex.2.) Plaintiffs have failed to explain how this language violates their First Amendment rights. According to the state, this language helps insure compliance with the refund provisions and serves to advise contributors of the necessary qualifications for a refund. The Court agrees. The refund is only available for contributions made to candidates who have signed the agreement to limit campaign spending, and the language on the coupon is a reasonable means of notifying contributors of that provision.

Conclusion

Based upon the files, records and proceedings herein, **IT IS ORDERED, ADJUDGED AND DECREED** that:

(1) Plaintiff's Motion for Summary Judgment (Doc. No. 14) is **GRANTED IN PART**, and the Clerk of Court shall enter partial summary judgment in favor of Plaintiffs declaring Minnesota Statutes section 10A.25, subd. 10(b)(iii) unconstitutional and permanently enjoining Defendant from enforcing Minnesota Statutes section 10A.25, subd. 10(b)(iii);

(2) Plaintiff's Motion for Summary Judgment is, in all other respects, **DENIED**; and

(3) Plaintiff's Complaint (Doc. No. 1) is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 21, 1995

s/s
RICHARD H. KYLE
United States District

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Patrick Rosenstiel
and Christopher Longley,

Plaintiffs,

vs.

Civil No. 3-94-1008
MEMORANDUM OPINION AND ORDER

John Holahan, Jr., in his capacity as Chair of the Ethical Practices Board, or his successor,

Defendants.

Harlan Goulett, Stoneking & Goulett, Minneapolis, Minnesota, for plaintiffs.

Richard S. Slowes, Minnesota Attorney General's Office, Saint Paul, Minnesota, for defendants.

Introduction

This matter comes before the Court on Plaintiffs Patrick Rosenstiel's ("Rosenstiel") and Christopher Longley's ("Longley") Motion for Preliminary Injunction. Plaintiffs seek to enjoin Defendant John Holahan, Jr. ("Holahan"), named in

his capacity as Chair of the Ethical Practices Board ("Board"), and any other state actors from enforcing Minn. Stat. §§ 290.06, subd. 23 and 10A.25, subd. 10(b)(i), (ii) and (iii); 10A.28, subds. (1) and (2); 10A.31; and 10A.322 of the Minnesota Ethics in Government Act ("Campaign Act" or "Act"). Minn. Stat. § 10A.02 et. seq. (1988 & Supp. 1994)

Background

A. Parties

Plaintiff Longley is a candidate for the Minnesota House of Representatives in District 64A in Saint Paul. Plaintiff Rosenstiel was a candidate for the Independent-Republican Party endorsement for the Minnesota House of Representatives in District 59B in Minneapolis. Rosenstiel ran in the Independent-Republican primary election held on September 13, 1994. Rosenstiel did not receive the Independent-Republican Party endorsement. Named party defendant in this matter is John Holahan, Jr., chair of the Minnesota Ethical Practices Board. The Minnesota Ethical Practices Board is responsible for the administration, interpretation and enforcement of the Minnesota Campaign Act.

B. Minnesota Ethics in Government Act

Plaintiffs allege that several financial provisions of the Minnesota Campaign Act have coerced plaintiffs into limiting and restricting their First Amendment rights to engage in political fund-raising, expenditure and expression. The Minnesota Campaign Act establishes guidelines for financing Minnesota political campaigns. Pursuant to this Act, candidates may be eligible for public subsidies to help finance their campaigns if they agree to predetermined campaign

spending limits. Minnesota has conditioned public campaign subsidies on candidates' agreements to adhere to spending limits since 1976. Last year, however, the Minnesota Legislature amended the eligibility and subsidy distribution requirements in the Act.

Plaintiffs challenge several of these new provisions, as well as several portions of the original Act. First, Plaintiffs challenge changes made to section 10A.25, subd. 10(b). Section 10A.25 establishes the limits for campaign expenditures. In order to receive a public campaign subsidy, a candidate must agree to limit campaign expenditures to these amounts. Minn. Stat. § 10A.322. According to section 10A.25, subd. 10(b), if a candidate agrees to be bound to the preestablished spending limits, but that candidate's opponent does not agree to be bound, then the following occurs: (1) the candidate who agreed is no longer bound by the spending limits; (2) the candidate who agreed is still eligible to receive the public subsidy; and (3) the candidate who agreed receives all, or a portion of, his or her opponent's public subsidy. Subsections (1) and (2) were adopted in 1988; subsection (3) was adopted May 15, 1993. Plaintiffs claim all three subsections are unconstitutional.

Second, plaintiffs challenge section 10A.28, entitled "Penalty for Exceeding Limits." This section imposes a civil fine for candidates who formally agree to be bound by the spending limits, but later breach that agreement by making expenditures or accepting contributions in excess of the applicable spending limit. Minn. Stat. § 10A.28, subds. 1, 2. According to this provision, a candidate in these circumstances is subject to a civil fine of up to four times the amount by which the expenditure or contribution exceeded the limit. This sanction was not part of the 1993 amendments, but has been in place since at least 1988. Plaintiffs claim these subdivisions violate their First Amendment free-speech rights.

Third, plaintiffs challenge section 10A.31, entitled "Designation of Income Tax Payments." This section creates a State Elections Campaign Fund. This section then divides this fund into two accounts: a political party account and a general account. According to this section, taxpayers may designate on their tax return that $5 shall be paid from the state's general fund into either a general campaign account or the account of a political party. The campaign subsidies discussed in section 10A.25 are drawn from these accounts according to predetermined percentages and paid out to eligible candidates. Only those candidates who agree to be bound to spending limits are eligible for these funds. Minn. Stat. § 10A.31, subd. 6; Minn. Stat. § 10A.322, subd. 1. The funds are not distributed until after the results of the primary election are determined. Minn. Stat. § 10A.31, subd. 6. In addition to a candidate's agreement to be bound to spending limits, section 10A.31 also sets forth numerous other eligibility requirements and factors for determining the amount a particular candidate will be allowed to receive and when she will receive it.

Fourth, plaintiffs challenge section 10A.322. This section sets out the specific requirements for executing the public subsidy agreements. As noted, candidates are not eligible for the campaign subsidy unless they formally execute this agreement. This section regulates the content, scope, duration, and procedural standards for these agreements. The 1993 Amendments made several minor changes to this section. Plaintiffs challenge section 10A.322 in its entirety.

Finally, plaintiffs challenge amendments made to the state's refund contributions system. Minn. Stat. § 290.06, subd. 23. Although not in the Campaign Act, the amendments to the refund system are derived from the Campaign Act. According to the refund system, a taxpayer may claim a refund equal to the amount of the taxpayer's contributions to candidates and to any political party made in the calendar year.

The maximum refund is limited to $50 for an individual or $100 for a married couple filing jointly. The refund is not available, however, for a contribution to candidates who have not agreed to be bound by the campaign expenditure limits as provided for in the Campaign Act. Minn. Stat. § 290.06, subd. 23(b). This provision has been in place since 1990. 1990 Minn. Laws ch. 608, art. 3, § 28. Plaintiffs seek to enjoin the entire refund system provided in section 290.06, subd. 23 and to have the same be declared unconstitutional.

Discussion

A. Standard for Preliminary Injunction

Plaintiffs seek a preliminary injunction requesting this Court to enjoin the Ethical Practices Board from enforcing Minn. Stat. §§ 10A.25, subd. 10(b); 10A.28; 10A.31; 10A.322; and 290.06, subd. 23. The test for determining whether to grant or deny preliminary injunctive relief is well established. In determining whether to exercise its injunctive powers, the district court must consider the following factors:

(1) the probability that the moving party will succeed on the merits;

(2) the threat of irreparable harm to the moving party should a preliminary injunction be denied;

(3) the balance between this harm and the harm that granting the injunction will cause to the other parties in litigation; and

(4) the public interest.

West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1222 (8th Cir.), cert. denied 479 U.S. 1070, 107 S.Ct. 962 (1986); Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). None of the factors by itself is determinative; rather, in each case the district court must balance all four factors. Dataphase, 640 F.2d at 113. The party requesting the injunction bears "the complete burden of proving that a preliminary injunction should be granted." Gelco Corp v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987).

B. Analysis

The Plaintiffs claim that the Dataphase four-prong analysis applies only to non-speech cases, and that "if plaintiffs demonstrate they are likely to succeed on the merits of their First Amendment political speech claims. .they are immediately entitled to a preliminary injunction." (Pl.'s Mem. in Supp. for Prelim. Inj. at 7.) Plaintiffs have cited no authority for this position. More importantly, this is not the approach used in the Eighth Circuit. See ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994); O'Connor v. Peru State College, 728 F.2d 1001 (8th Cir. 1984), (remanded and affirmed on other grounds); Bloom v. O'Brien, 841 F.Supp. 277 (D.Minn. 1993). Indeed, the O'Connor court criticized the district court for placing too much emphasis on the probability of success on the merits prong. O'Connor 728 F.2d at 1002. The O'Connor court also specifically directed the district court's attention to its instructions in Dataphase, which provided that "in balancing equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of relative injuries to the parties and the public." Id. (quoting Dataphase Systems, Inc. v. C L

Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)). Thus the Dataphase analysis is appropriate in this case.

1. Probability of Success on the Merits

In order for the Court to grant plaintiff's motion for a preliminary injunction, plaintiffs must demonstrate that they are likely to succeed in proving that the Minnesota statutes at issue are unconstitutional. The Eighth Circuit has recently determined that several sections of the amended Minnesota Campaign Act are unconstitutional. Day v. Holahan, Nos. 94-2387, 94-2388, 94-2390, 94-2587 (8th Cir. Sept. 1, 1994). None of the provisions struck down in the Day case is at issue in the present matter. The Eighth Circuit analysis, however, does apply to evaluating the merits of this case. The Eighth Circuit set out the traditional three-party analysis to test whether a state law violates the First Amendment. This approach was promulgated in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968). First, the court considers whether the law at issue in fact restricts protected speech. Day, slip op. at 7. Second, the court considers whether the restriction is based on the content of the speech or is content-neutral. Id. at 8. Third, the court considers the relationship between the law and the state interest the law was promulgated to serve. Id. at 9. If a statute's restriction of free speech is content-neutral, the law will survive First Amendment attack only if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (Id. at 11 (quotations omitted)). If a statute's restriction is content-based, the law will be unconstitutional unless the state can show it is "narrowly drawn to serve a compelling governmental interest." Id. at 9.

The Supreme Court has authorized campaign subsidies which condition public financing on campaign expenditure limits. In Buckley v. Veleo, the Court explained that:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fund-raising and accept public finding.

424 U.S. 1, 57 n.65, 96 S.Ct. 612, 653 n.65. (1976) The Supreme Court has also upheld this same system of campaign financing against direct First Amendment attack. Republican Nat'l Comm. v. Federal Election Comm'n, 445 U.S. 955, 100 S.Ct. 1939, aff'g mem. 487 F.Supp. 280 (S.D.N.Y. 1980); see also Vote Choice v. DiStefano, 4 F.3d 26 (1st Cir. 1993) (holding that state funding system whereby gubernatorial candidates received public campaign funds in exchange for agreement to campaign spending cap did not violate the First Amendment).

Several provisions of the Minnesota laws at issue in the present motion are compatible with these sanctioned campaign reform systems. Sections 10A.25(b)(i) and (ii) provide that a candidate may exceed the spending cap and still be eligible for public funds when her opponent does not agree to the spending cap. Section 10A.322 sets out the procedural requirements for the expenditure agreements. Section 10A.31 creates the funds from which the public subsidies are drawn. Section 10A.28 authorizes a civil fine for those candidates who formally agree to limit expenditures in exchange for public funds, but then breach that agreement. Although plaintiffs present several plausible arguments distinguishing the Minnesota system from the sanctioned systems, plaintiffs have

not demonstrated that they are clearly likely to succeed on the merits with regard to these provisions.

The Minnesota Campaign Act does, however, have several unique components. Section 10A.25, subd. 10(b)(iii) does not have an analogous counterpart to other sanctioned systems. According to this section, if a candidate chooses to participate in the subsidy program, but that candidate's opponent does not, the complying candidate will receive his or her opponent's share of the fund. Similarly, section 290.06, subd. 23 appears to be unique to the Minnesota system. According to this section, a candidate's supporters may not receive any refund for their contribution unless that candidate adheres to the spending limits, but supporters of candidates who have agreed to be bound are entitled to have up to $50 of their contributions refunded.

Plaintiffs have persuasively argued that both of these sections implicate protected speech. The Supreme Court has recognized that political expenditures are a form of speech protected by the First Amendment. Buckley, 424 U.S. at 16-17, 96 S.Ct. at 633. Moreover, these sections go beyond merely providing candidates with the choice "to forgo private fund-raising and accept public funding" that was authorized in Buckley. Id. at 458 n.56, 96 S.Ct. at 653 n.65. Section 10A.25, subd. 10(b)(iii) provides additional funds, funds which otherwise would not be available, to a candidate's opponent based on this choice. Thus the State steps out of its role as neutral comptroller and instead takes a direct, partisan posture in the campaign. Via this process, the state functionally advocates a candidate's defeat based on her exercise of her First Amendment right to accept private political funds. This is significantly different than the system condoned in Buckley. Based on the Day analysis, this Court need not address whether the restriction is content-based or content-neutral. In either case, this infringement on First Amendment rights does not appear to serve a sufficiently important or compelling state

interest. See Day v. Holahan, Nos. 94-2387, 94-2388, 94-2390, 94-2587, slip op. at 12 (8th Cir. Sept 1, 1994).[1]

The state refund system, section 290.06, subd. 23, also imposes an additional burden on protected speech. As noted, contributions to political campaigns are a form of protected political speech. Section 290.06, subd. 23 selects certain political speech for beneficial treatment. The triggering mechanism for the preferred treatment is clearly content-based. The statute singles out selected political speech, that which advocates the support of a candidate who has not agreed to a spending cap or the defeat of her opponent, for particular treatment. Specifically, based on the content of the speech, some contributions are refunded while others are not. The knowledge that some contributions will be refunded while others will not obviously affects a contributor's decision to engage in this type of speech. Contributors will be less likely to donate to candidates who have not agreed to the spending limits. As a result, this section operates to chill protected speech. Moreover, as indicated above, whether section 290.06, subd. 23 is content-based or content neutral is not crucial to assessing the constitutionality of this statute. The state has not demonstrated this serves a sufficiently important interest.

Plaintiffs have demonstrated that at least with respect to sections 10A.25, subd. 10(b)(iii) and 290.06, subd. 23 they

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[1] In Day, the state's professed interest to justify several 1993 amendments to the Campaign Act was "the goal of enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept the voluntary campaign expenditures of section 10.25 and the accompanying public subsidies." Day slip op. at 9-10. After reviewing candidate participation rates prior to the 1993 amendments, the Day court held that "the statute's [§10A.25, subd. 13] burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny." Id. at 12.

may be likely to succeed on the merits. However, as the Dataphase court stressed, this is not dispositive to determining whether a preliminary injunction is appropriate.

2. Threat of Irreparable Harm

To satisfy the threat of irreparable harm element, the plaintiffs must prove that actual harm will result without injunctive relief. The absence of such a showing alone is sufficient to deny a preliminary injunction. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 420 (8th Cir. 1987). In deciding the propriety of issuing a preliminary injunction, the court considers the type of harm plaintiffs allege will occur. Bloom v. O'Brien, 841 F.Supp. 277, 279 (D.Minn. 1993). In this case, plaintiffs allege that they will suffer irreparable harm unless this Court immediately enjoin enforcement of the contested provisions of Minnesota's Campaign Act.

Plaintiffs contend that the Minnesota campaign laws violate their First Amendment free-speech rights, and that as such they inflict irreparable harm. The Supreme Court has recognized the special value of First Amendment freedoms, stating that "[t]he loss of First Amendment freedoms, even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976). Thus the question of whether plaintiffs are suffering irreparable harm is largely subsumed in analyzing the merits of plaintiffs' claim. Those provisions which likely infringe on protected First Amendment free-speech will at the same time cause irreparable injury, those that do not violate the First Amendment will not. Accordingly, to the extent plaintiffs have shown they are likely to succeed on the merits, they also have satisfied the Dataphase irreparable injury prerequisite.

3. Balance of Harm Between the Parties

Before granting injunctive relief, the court must balance the potential harm to both parties in the litigation. The balance of harm must tip decidedly to the moving party to justify issuing a preliminary injunction. See General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 624-25 (8th Cir. 1987); Bloom v. O'Brien, 841 F.Supp. 277, 280 (D.Minn. 1993). Additionally, plaintiff, as the moving party, bears the "complete burden" of proof in this regard. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987).

Plaintiffs offered no evidence or discussion of this factor in their briefing or during oral argument. Instead, plaintiffs mistakenly assumed that courts do not balance relative harms caused by injunctive relief when First Amendment rights are at stake. (Pl.'s Mem. in Supp. for Prelim. Inj. at 33.) Notwithstanding the plaintiffs' claim, the Eighth Circuit law is clear. This Court must consider the harm to be suffered by the plaintiffs if a preliminary injunction is denied, balanced against the harm caused to the defendant if a preliminary injunction is granted.

In this analysis, the Court recognizes that the timeliness of political speech is particularly important. Elrod v. Burns, 427 U.S. 347, 374 n.29, 96 S.Ct. 2673, 2690 n.29 (1976) (citations omitted). The plaintiffs allege that the Minnesota campaign laws coerced plaintiffs into agreeing to spending limits, and as a result plaintiffs are suffering current and tangible harm because they are engaging in far less political speech than they would without the limits. (Pl.'s Compl. ¶¶ 12, 15.)

At the outset it is clear that Plaintiffs Rosenstiel and Longley are not suffering the same alleged burdens on campaign speech. Rosenstiel did not receive the Independent-Republican endorsement for the District 59B House of Representatives seat and is no longer a candidate in the 1994

legislative race. As a result, the immediacy of his claim is greatly diminished. Rosenstiel claims he will run again in 1996. Assuming, arguendo, that Rosenstiel still has standing for his present claim, Rosenstiel will not be eligible for public subsidies for nearly two years. Rosenstiel has offered no evidence which suggests he will suffer significantly more harm if the Court waits to resolve this dispute on the merits rather than granting immediate relief. Accordingly, the harm imposed on Rosenstiel by not issuing the injunction is de minimis.

Plaintiff Longley is still a candidate for the Minnesota House of Representatives in the 1994 race. The general election for Minnesota will be held on November 8. Thus if no injunction is issued, Longley will have approximately five weeks in which he theoretically could have raised additional campaign funds.[2] This assumes that in this short period Longley could in fact raise those funds and meaningfully convert them into campaign speech. Although Longley alleges that his fund-raising ability has been curtailed by the spending limit up to this point in his campaign, Longley does not specifically discuss the extent to which his alleged harm is increased if the Court denies interlocutory relief and resolves the dispute on the merits after the election.

The defendant did not specifically address the harm caused to the Minnesota Ethical Practices Board if an injunction is issued. The defendant instead focused much of the discussion on the harm caused to other state agencies, other candidates, and the public at large. These harms are

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[2] In assessing the immediacy of plaintiff's claim, the court notes that Minnesota has conditioned public funding on a candidate's agreement to spending limits since 1976. The most recent changes to Minnesota's campaign laws were formally adopted over a year ago, on May 15, 1993. Thus there has been ample opportunity to challenge the laws prior to the eve of the election.

considered in the final Dataphase factor. Nonetheless, the Dataphase analysis specifically directs the district court to consider the harm to the other parties litigant.

Besides Rosenstiel and Longley, the Minnesota Ethical Practices Board is the only named party named to this suit. The Board is the state body charged with the administration, enforcement, and interpretation of Minnesota's campaign finance laws. Minn. Stat. § 10A.02. The parties have not further clarified the role the state Board plays in the election. The parties also have not addressed how the relative harms caused to the Board by an immediate injunction as opposed to a resolution on the merits would impact the Board's function. Plaintiffs bear the burden of showing why the harm they suffer by not enjoining the statute outweighs that caused to the Board by granting the injunction. Plaintiffs have offered no argument in this regard. It appears to the Court that dissolving the finance subsidy, the campaign spending caps, and the tax refunds, or portions thereof, in the midst of the election would reek substantial havoc on the Board's operation. Given the public interest discussed below, however, the Court finds further inquiry into the balance of relative harms unnecessary, and the Court declines to further speculate on the impact an injunction would have on the Board.

4. The Public Interest

In addition to the interests of the litigants themselves, the court must consider separately how a preliminary injunction would affect the public interest. Minnesota's general election will be held on November 8. The primary is concluded and the candidates are in the midst of their election campaigns. Issuing an injunction at this late stage in the campaign would have a tremendous impact on the entire election.

The scope of the preliminary injunction plaintiffs seek is extraordinarily broad. Their Motion asks the Court to declare several specific provisions of the Campaign Act unconstitutional and to enjoin their enforcement.[3] The Motion also asks the Court to enjoin the disbursements of all "public funds pursuant to or under the authority of the unconstitutional sections" of the statute.[4] (Id.) Since one of the sections listed is section § 10A.31, which creates the subsidies and directs payment, plaintiffs apparently seek to have the public finding of the election enjoined in its entirety. (Id.) Plaintiffs also cite the tax refund provision, section 290.06, subd. 23 and accordingly seek to have the tax refunds enjoined. (Id.)

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[3] As indicated, the provisions the plaintiffs ask the Court to enjoin are: Minn. Stat. §§ 10A.25, subd. 10(b)(i), (ii) and (iii) (effects of opponent's agreement); Minn. Stat. § 10A.28, subds. 1 and 2 (penalties for exceeding limits); Minn. Stat. § 10A.31 (establishing tax check-off system, providing formulas for and directing payment of subsidies); Minn. Stat. § 10A.322 (requiring agreement to comply with limits to be eligible for subsidy); and Minn. Stat. § 290.06, subd. 23 (tax refund for contributions).

[4] Although the Court has not been appraised by either party on the issue, it appears to the Court after reviewing the Campaign Act that, pursuant to § 10A.31, subd. 6, at least some of the subsidies have already been disbursed to the candidates. Section 10A.31, subd. 6 requires, in pertinent part, that"

> [a]s soon as the board has obtained from the secretary of state the results of the primary election, but in any event no later than one week after certification by the state canvassing board of the results of the primary, the board shall distribute the available funds in each party account...to the candidates of that party who have signed the agreement as provided in section 10A.322.

Minnesota completed its primary on September 13, 1994. Presumably the results were certified shortly thereafter.

Plaintiffs offer no specific evidence or discussion to show how a preliminary injunction serves the public interest. Instead, plaintiffs contend that the effect an injunction has on the public's interest is not a factor in determining the propriety of the present injunction. (Pl.'s Mot. for Prelim. Inj. at 2) ("the other factors concerning `balance of harms,' `public policy' etc., are entirely subsumed under the First Amendment analysis.")) The plaintiffs do assert that "the `public interest' is presumptively served by adherence to the Constitution rather than its violation." (Id. at 2-3.) Plaintiffs also assert that vibrant and unrestricted political speech is desirable, while suppressed political speech is not. (Id. at 16-29.) Manifestly, these two assertions are true. They do not, however, justify a preliminary injunction in this case.

Plaintiffs seek to enjoin the public financing aspect of the Minnesota Campaign Act in its entirety. Defendants discuss at length the ramifications of enjoining all or part of Minnesota's campaign finance system this late in the election. The Court finds the defendant's discussion persuasive. Such an injunction would cause significant harm to the other candidates, the electoral process and the Minnesota citizenry generally.

Issuing the requested injunction would have a dramatic impact on the other Minnesota political candidates. Three hundred forty-eight candidates signed agreements to accept public funding and abide by the campaign limits during the 1994 elections. (McCoy Aff., ¶10.) Candidates relied on the spending limits to which they committed as well as the anticipation of receiving public funding if they won the primary when they developed campaign and spending strategies. Candidates no doubt also structured their fund-raising efforts on the basis of their participation in the funding program. Additionally, candidates' fund-raising literature may have informed potential contributors that they are participating in the public funding program and have agreed to spending limits. Their literature also may have advised contributors of

the availability of the contribution refund for the first $50 of their contribution.

Candidates' campaigns have progressed past the primary election. If the state has complied with section 10A.31, subd. 6, the funds from the party accounts have already been distributed. Assuming they could be recouped, or alternatively that they have not yet been issued, granting plaintiffs' injunction would do irreparable damage to all those candidates who have progressed thus far in reliance on the rules only to have them suddenly changed. To now deprive candidates of public funding would be grossly unfair. Such a deprivation would dramatically affect candidates' ability to engage in political speech. Candidates would have to devote a significant portion of their energy to rasing funds to finance the remainder of their campaign, thereby reducing the time available for substantive debate and communication.[5] Thus while plaintiffs have made a colorable claim that the campaign laws infringe on their ability to engage in political speech, there are more than the plaintiff's First Amendment rights at stake given the timing and effect of the injunction sought. Plaintiff's analysis is simply too myopic. The negative impact on political speech Longley cites is dwarfed by the negative impact the injunction sought would have on the political speech of all the other candidates.

Moreover, the harm caused by a preliminary injunction cannot be diminished by applying it only to plaintiff Longley. First, the Court notes that the rights of Longley's opponent would be substantially effected by granting the injunction only as to Longley. To remove the spending limits only for

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[5] Indeed, the Supreme Court has specifically recognized public subsidies "facilitate communication by candidates with the electorate and...free candidates from the rigors of fund-raising" and as such serve the public interest. Buckley v. Valeo, 424 U.S. 1, 91, 96 S.Ct. 612, 669 (1976).

Longley would give him an unfair advantage in the campaign. Longley's opponent is not a party to this proceeding and thus would still be bound to the campaign limit. Thus an injunction would give Longley an undue edge in the election. Additionally granting such an injunction would alter the campaign scale, which, for the same reasons as discussed above, undoubtedly would disrupt Longley's opponent's campaign strategy for the remainder of the election.[6] Finally, the state cannot as a practical matter have one campaign financing law for plaintiff Longley and his opponent and another for all other candidates.

In addition to causing serious hardship to other candidates, plaintiffs' requested relief also would impose an undue burden on state administrators and the public generally. With regard to the subsidies, if funds have already been issued to candidates as required by section 10A.31, subd. 6, recouping these funds could prove a colossal administrative burden, if feasible at all. Similarly, enjoining the state campaign refund and contribution system would cause significant harm to the public interest. The ramifications of shutting down the refund and contribution system are compatible with the harm caused by enjoining the public funding system. Such an injunction would upset the public's reliance on the established set of rules in the midst of the campaign. Undoubtedly many contributors have already donated funds counting on the refund to which the law currently entitles them. Others may have been educated about

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[6] Although not necessary to the resolution of plaintiffs' Motion, the Court recognizes that the rights of third parties not joined as parties in this matter would be substantially effected by the relief requested. As a result, even if the plaintiffs satisfied the Dataphase requirements, Rule 19 the Federal Rules of Civil Procedure may have required additional parties be joined before the Court could grant the relief requested. The parties did not address this issue in briefing or oral argument.

the refund by campaign literature and were waiting for the primary results to determine to whom to contribute.

Even if the refund law were enjoined prospectively, effectively communicating such a change to all people who need to be reached would be extremely difficult. Without doubt, administering such an injunction on a prospective basis would pose a significant problem. Individuals applying for the refunds would have to indicate and submit proof of the date of contribution, and the Department of Revenue would have to modify forms, instructions and procedures for processing returns to accommodate this change.

Perhaps most significantly, the injunction sought in this case would cause significant hardship to the voting public. As discussed, if state funds were suddenly cut off just before the election, candidates who relied upon them would be less effective in communicating with the voting public. Candidates would be less able to inform the public about their political views, candidates would be less able to engage in public debate, and the voting public would be less able to make informed decisions when casting their ballots.

After reviewing the four Dataphase factors together, the Court concludes that the plaintiffs have not met their burden of proving that a preliminary injunction is warranted.

Order

Based upon the files, records and proceedings herein, **IT IS ORDERED** that plaintiffs' Motion for Preliminary Injunction (Doc. No. 2) is **DENIED.**[7]

Dated: September 30, 1994

s/s
RICHARD H. KYLE
United States District Judge

[7]The foregoing Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. amend. I

Amendment I to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Minn. Stat. § 10A.25 (as amended by Laws 1996, c. 459, § 2, eff. April 12, 1996).

The Minnesota Ethics in Government Act provides, in relevant part:

> **10A.25 Limits on Campaign Expenditures**
>
> . . .
>
> **Subd. 2**. (a) In a year in which an election is held for an office sought by a candidate, no expenditures shall be made by the principal campaign committee of that candidate, nor any approved expenditures made on behalf of that candidate which expenditures and approved expenditures result in an aggregate amount in excess of the following . . .
>
> . . .
>
> **Subd. 10. Effect of opponent's conduct.** (a) A candidate who has agreed to be bound by the

expenditure limits imposed by this section as a condition of receiving a public subsidy for the candidate's campaign is released from the expenditure limits but remains eligible to receive a public subsidy if the candidate has an opponent who does not agree to be bound by the limits and receives contributions or makes or becomes obligated to make expenditures during that election cycle in excess of the following limits:

(1) up to ten days before the primary election, receipts or expenditures equal to 20 percent of the expenditure limit for that office as set forth in subdivision 2; or

(2) after ten days before the primary election, cumulative receipts or expenditures during that election cycle equal to 50 percent of the expenditure limit for that office as set forth in subdivision 2.

(b) A candidate who has not agreed to be bound by expenditure limits, or the candidate's principal campaign committee, shall file written notice with the board and provide written notice to any opponent of the candidate for the same office within 24 hours of exceeding the limits in paragraph (a), clause (2). The notice must state only that the candidate or candidate's principal campaign committee has received contributions or made or become obligated to make campaign expenditures in excess of the limits in paragraph (a), clause (2). Upon receipt of the notice the candidate who has agreed to be bound by the limits is no longer bound by the expenditure limits.

Minn. Stat. § 10A.25, subd. 10 (as amended by Laws 1996, c. 459, § 2, eff. April 12, 1996).

3. Minn. Stat. § 10A.25, subd. 10 (prior to amendment by Laws 1996, c. 459, § 2, eff. April 12, 1996).

Prior to amendment in 1996, subdivision 10 of section 10A.25 provided:

> (a) The expenditure limits imposed by this section apply only to candidates whose major political party opponents agree to be bound by the limits and who themselves agree to be bound by the limits as a condition of receiving a public subsidy for their campaigns.
>
> (b) A candidate who agrees to be bound by the limits and receives a public subsidy, who has an opponent who: (1) is a candidate of a major political party; and (2) does not agree to be bound by the limits but is otherwise eligible to receive a public subsidy:
>
> (i) is no longer bound by the limits, including those in section 10A.324, subdivision 1, paragraph (c);
>
> (ii) is eligible to receive a public subsidy; and
>
> (iii) also receives, or shares equally with any other candidate who agrees to be bound by limits, the opponent's share of the general account public subsidy under section 10A.31.

For purposes of this subdivision, "otherwise eligible to receive a public subsidy" means that a candidate meets the requirements of sections 10A.31, 10A.315, 10A.321, and 10A.322, but does not mean that the candidate has filed an affidavit of matching funds under section 10A.323.

Minn. Stat. § 10A.25 (prior to amendment by Laws 1996, c. 459, § 2, eff. April 12, 1996).

4. Minn. Stat. § 10A.322, Subd. 4.

Subdivision 4 of Minnesota Statutes, section 10A.322, provides:

Subd. 4. Refund receipt forms; penalty. The board shall make available to a political party on request and to any candidate for whom an agreement under this section is effective, a supply of official refund receipt forms that state in boldface type that (1) a contributor who is given a receipt form is eligible to claim a refund as provided in section 290.06, subdivision 23 and (2) if the contribution is to a candidate, that the candidate has signed an agreement to limit campaign expenditures as provided in this section. The forms must provide duplicate copies of the receipt to be attached to the contributor's claim. A candidate who does not sign an agreement under this section and who willfully issues an official refund receipt form or a facsimile of one to any of the candidate's contributors is guilty of a misdemeanor.

Minn. Stat. § 10A.322, Subd. 4.

5. Minn. Stat. § 290.06. Subd. 23.

Subdivision 23 of Minnesota Statutes, section 290.06, provides:

> **Subd. 23. Refund of contributions to political parties and candidates.** (a) A taxpayer may claim a refund equal to the amount of the taxpayer's contributions made in the calendar year to candidates and to any political party. The maximum refund for an individual must not exceed $50 and, for a married couple filing jointly, must not exceed $100. . . .
>
> (b) No refund is allowed under this subdivision for a contribution to any candidate unless the candidate:
>
> (1) has signed an agreement to limit campaign expenditures as provided in section 10A.322 or 10A.43;
>
> (2) is seeking an office for which voluntary spending limits are specified in section 10A.25 or 10A.43; and
>
> (3) has designated a principal campaign committee.

Minn. Stat. § 290.06. Subd. 23.

6. Minn. Stat. § 10A.27.

Minnesota Statutes section 10A.27, subdivision 1 provides:

candidate's principal campaign committee to accept aggregate contributions made or delivered by any individual, political committee, or political fund in excess of the following:

(a) to candidates for governor and lieutenant governor running together, $3000 in an election year for the office sought and $500 in other years;

(b) to a candidate for attorney general, $1000 in an election year for the office sought and $200 in other years;

(c) to a candidate for the office of secretary of state, state treasurer or state auditor, $500 in an election year for the office sought and $100 in other years;

(d) to a candidate for state senator, $500 in an election year for the office sought and $100 in other years; and

(e) to a candidate for state representative, $500 in an election year for the office sought and $100 in the other year.

The following deliveries are not subject to the bundling limitation in this subdivision:

(1) delivery of contributions collected by a member of the candidate's principal campaign committee, such as a block worker or a volunteer who hosts a fund raising event, to the committee's treasures; and

(2) a delivery made by an individual on behalf of the individual's spouse.

Minn. Stat. § 10A.27. Subd. 1.

Supreme Court, U.S.
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No. 96-1454

In The

Supreme Court of the United States

October Term, 1996

PATRICK ROSENSTIEL and CHRISTOPHER LONGLEY,

Petitioners,

vs.

CAROLYN RODRIGUEZ, in her capacity as Chair of the Ethical Practices Board,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge Minnesota's state campaign financing system that provides partial public funding in return for a candidate's agreement to limit campaign expenditures to a state-determined level. A participating candidate whose opponent does not agree to the expenditure limit and has raised or spent money exceeding threshold amounts is freed from the spending limit and is allowed to retain the public subsidy. In addition, the state will refund up to $50 annually to an individual for contributions to the campaigns of participating candidates, but does not allow a refund for contributions to non-participating candidates.

1. Are the incentives provided for candidates to agree to participate in the above-described campaign financing system so great as to burden First Amendment rights by coercing candidates into agreeing to campaign expenditure limits?

2. Are the provisions of the above-described campaign financing system narrowly-tailored to serve compelling state interests recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976)?

3. Does a campaign finance system that treats challengers and incumbents equally violate the First Amendment because it does not eliminate inherent electoral advantages enjoyed by incumbents?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent[1] respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. That opinion (App. A1-A45) is reported at 101 F.3d 1544. The decisions of the district court denying Petitioners' motion for a preliminary injunction (App. A66-A85) and ruling on the merits (App. A46-A65) are unreported.

STATEMENT OF THE CASE

Petitioners, unsuccessful candidates for election to the Minnesota House of Representatives in the 1994 election, challenge the constitutionality of Minnesota's campaign finance system, under which candidates may receive partial public campaign funding in exchange for the candidates' agreement to be bound by campaign expenditure limits. In order to receive public funding, a candidate must sign and file with the Board a written agreement to be bound by the campaign expenditure limits set forth in Minn. Stat. § 10A.25 (1994).[2] Minn. Stat. § 10A.322, subd. 1(a) (1994). A participating candidate

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[1] Respondent is the chair of the state Ethical Practices Board ("Board"), which is the body charged with administration and enforcement of the state campaign finance laws.

[2] Once filed, the agreement may not be rescinded, Minn. Stat. § 10A.25 (1994), and remains in effect until the end of the election cycle. Minn. Stat. § 10A.322, subd. 2 (1994). A candidate who has agreed to the limit but permits his or her campaign committee to spend in excess of the cap is subject to a civil fine of up to four times the amount of excess spending. Minn. Stat. § 10A.28, subd. 2 (1994).

who wins her party primary is eligible for a subsidy from the "party" account which is funded by taxpayer check-offs for that candidate's party on state income tax forms. Minn. Stat. § 10A.31, subds. 5 and 6 (1994). Candidates in the general election who receive the required minimum percentage of the votes[3] are eligible for a subsidy from the "general" account, the amount of which is based on a statutory formula for each office. Minn. Stat. § 10A.31, subd. 5 (1994).[4] The combined subsidy received by a candidate may not exceed 50% of the expenditure limit applicable to that candidate. Minn. Stat. § 10A.31, subd. 7 (1994).

The average subsidy received by candidates for the state senate for the 1992 elections was $10,133. The average subsidy in 1992 for candidates for the house was $5,144. Affidavit of Mary Ann McCoy (filed in opposition to Petitioners' motion for a preliminary injunction) ("McCoy Aff."), para. 2; Eighth Circuit Joint Appendix ("JA") at A-21.[5]

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[3] Candidates for statewide office must receive at least five percent of the votes cast in the general election for that office, and candidates for legislative office must receive at least ten percent of the votes cast in the general election for the specific office for which they were candidates. Minn. Stat. § 10A.31, subd. 7 (1994).

[4] In order to be eligible for public funding a candidate also must raise sufficient private contributions to meet threshold matching fund requirements prescribed in Minn. Stat. § 10A.323 (1994). A candidate who is unopposed in both the primary election and the general election is not eligible to receive public funding. Minn. Stat. § 10A.31, subd. 12 (1994).

[5] The 1992 elections were the latest for which data were available when the record was made in the district court.

The spending limits to which candidates must agree in order to receive the public funding are established in statute, Minn. Stat. § 10A.25, subd. 2(a) (1994), subject to adjustment for inflation, Minn. Stat. § 10A.255 (1994). The spending limits in 1992 were $43,150 for candidates for state senate and $21,576 for candidates for state house of representatives. McCoy Aff., para. 3; JA at A-21. Although normally the limits are increased based on the Consumer Price Index, the 1993 Legislature froze the expenditure limits for the 1994 election at the 1992 levels. Act of May 20, 1993, ch. 318, art. 2, § 52, subd. 4, 1993 Minn. Laws 1907. Consequently, the limit for house candidates in 1994, which was applicable to Petitioners, remained at $21,576.

The average campaign spending in 1992 for senate candidates was $23,648, and for house candidates the average was $12,773. McCoy Aff., para. 6; JA at A-22. Therefore, the average candidate spent barely more than half of the amount allowed by the spending limits.

At the time this action was filed and at the time the district court ruled, the campaign finance law also provided that if a participating candidate was faced in the general election by a major-party opponent who did not participate in the public funding/spending limit program, the participating candidate would not be bound by the spending limit, Minn. Stat. § 10A.25, subd. 10(b)(i) (1994), and would remain eligible to receive the public funding, *id.*, subd. 10(b)(ii).[6] While this matter was pending in the court of appeals, the legislature amended the

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[6] In addition, a 1993 amendment to the campaign finance laws made the participating candidate eligible to receive part of

provision that freed a participating candidate from the spending limit (hereinafter the "expenditure limit waiver"). Instead of being triggered by the non-participation of a major-party opponent, the expenditure limit waiver is now triggered if any non-participating opponent of a participating candidate either raises or expends campaign funds beyond statutory threshold amounts, whether that non-participating opponent is from a major party or not. Minn. Stat. § 10A.25, subd. 10 (1996). Specifically, the spending limit is waived for a participating candidate whose non-participating opponent receives contributions or makes expenditures equal to 20% of the applicable spending limit prior to 10 days before the primary election, or receives contributions or makes expenditures equaling 50% of the spending limit after that date. *Id.*

In addition to the direct public subsidy, an additional incentive to agree to the spending limits is a potential refund for contributors. Individuals may claim a refund of up to $50 ($100 for a married couple filing jointly) for contributions to the campaigns of candidates who have agreed to the limits. Minn. Stat. § 290.06, subd. 23 (1994). However, the law allows a maximum total refund of $50 per individual per year, not $50 for each contribution. A contribution to a participating candidate can qualify for

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the subsidy for which the candidate's non-participating opponent would have been eligible. Minn. Stat. § 10A.25, subd. 10(b)(iii) (1994). The district court held this "opponent's share" provision unconstitutional, and it was repealed by the 1996 Minnesota Legislature. Act of April 11, 1996, ch. 459, § 2, 1996 Minn. Laws 1517.

the refund whether or not the participating candidate's opponent has agreed to the expenditure limits.[7]

Petitioners began this action for declaratory and injunctive relief in August, 1994. Petitioners were then candidates for the Minnesota House of Representatives.[8] Each had signed an agreement under Minn. Stat. § 10A.322 (1994) to abide by the statutory campaign expenditure limit in return for public campaign funding. They alleged that they each could privately raise campaign funds in excess of the spending limit, but were coerced into agreeing to the limit and public funding by the provisions of the Minnesota campaign finance law. The Complaint asked that numerous provisions of the campaign finance law be declared unconstitutional and enjoined.[9]

In September, 1994, Petitioners moved for a preliminary injunction against the operation of the campaign finance laws during the November 1994 elections. On September 30, 1994, the district court denied the motion. Memorandum Opinion and Order dated Sept. 30, 1994

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[7] Petitioners mistakenly argued below that the contribution refund provision is a recently-enacted addition to the campaign finance law. In reality, the precursor to this refund provision was first enacted in 1978, and it has been part of the system in one form or another since then, except during a brief hiatus from 1987 to 1990. See court of appeals decision. (App. A23.)

[8] Subsequently, Petitioner Rosenstiel lost in the primary election, and Petitioner Longley lost in the general election. Both indicated by affidavit that they intend to run for office again in the future. (App. A47.)

[9] See district court explanation of provisions challenged. (App. A48-A50.)

(App. A66). The court opined that Petitioners were likely to prevail on the merits of their arguments that the opponent's share provision and the contribution refund provision of the law were unconstitutional, but denied the preliminary injunction because of the significant disruption that would result from enjoining the law, on which so many candidates had relied, so close to the election. (App. A81-A84.)

Petitioners then moved for summary judgment. The district court granted the motion in part, holding the opponent's share provision unconstitutional and enjoining its enforcement. Memorandum Opinion and Order dated March 21, 1995 (hereinafter "Final Order") (App. A46). The court upheld the remainder of the challenged law. The court reasoned that the provisions that provide public funding in return for agreement to spending limits and allow a participating candidate to retain the subsidy but exceed the limits if a major-party opponent does not participate were "compatible with the traditional campaign reform systems sanctioned in *Buckley* and its progeny." (App. A53.) The court also upheld the contribution refund provision, holding that it did not burden the First Amendment rights of either contributors or candidates. (App. A60-A64.)

Petitioners appealed to the Court of Appeals for the Eighth Circuit.[10] The appellate court affirmed in a 2-1 decision.[11] (App. A1.)

The majority first concluded that the amendment of the expenditure limitation waiver while the case was pending before the court of appeals did not render the case moot, and that it would evaluate the constitutionality of the law as amended. (App. A6-A7.) Addressing the merits, the court reasoned that it first had to determine if the challenged law burdens the exercise of political speech, and then if it does, whether it is narrowly tailored to serve compelling state interests. (App. A8.)

As to the first part of the analysis, the court decided that participation in the campaign finance system is truly voluntary, and there is, therefore, no burden on First Amendment rights. The court held that the challenged inducements, the expenditure limitation waiver and the contribution refund provision, do not per se render the system coercive because they are not inherently penal. (App. A12.) Further, the court stated, they do not cause the package to be so benefit-laden that candidates are coerced into participation. (*Id.*) The court recognized the expenditure limitation waiver as an attempt to avoid a powerful disincentive to candidate participation by removing the risk of being significantly outspent by a

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[10] Respondent did not appeal the part of the district court decision that held the opponent's share provision unconstitutional.

[11] Petitioners did not seek rehearing en banc in the court of appeals.

non-participating opponent. (*Id.*) The court also opined that the 1996 amendment permitting a non-participating opponent to raise up to 50% of the expenditure limit before the expenditure limitation waiver was triggered indicated a lack of coercion. (App. A13.) The court saw the contribution refund provision as merely an extension of the public subsidy that created no greater coercive effect. In sum, the court concluded that the system provides candidates with an additional option for financing their campaigns that is strictly voluntary and does not burden First Amendment rights. (App. A16.)

Alternatively, the court held that even if there were some burden on political speech, the challenged provisions are narrowly tailored to serve compelling state interests and therefore survive strict scrutiny. The court concluded that the state has a compelling interest in stimulating participation in a public campaign financing program that is intended to reduce the possibility and appearance of corruption that may arise from dependence on large campaign contributions. (App. A18.) The court noted that the basic system of providing public funding in return for agreement to abide by expenditure limits is consistent with laws that have long been upheld by this and other courts. (App. A19.)

Turning to the specific provisions challenged by Petitioners, the court held that the expenditure limitation waiver is narrowly tailored to serve the compelling interest of stimulating participation, because without it the fear of being outspent by a well-financed, privately-funded opponent would be a strong disincentive to participation, especially in a system where the subsidy can be no greater than half the spending limit. (App. A19-

A20.) Similarly, the court held the contribution refund satisfies the strict scrutiny test as a part of the public subsidy that encourages participation, because candidates will believe it can stimulate contributions from a broader array of citizens. (App. A22.)

Finally, the court rejected Petitioners' argument that the campaign financing system is unlawful because it discriminates against challengers. The court found no constitutional requirement that such a system must place challengers on an equal footing with incumbents where the laws treat them even-handedly. The court found unpersuasive Petitioners' attempt to establish a discriminatory legislative motive based on the comments of one legislator about the recent amendment to the expenditure limitation waiver that treats all candidates equally and simply removed a loophole not initially envisioned by the legislature. (App. A25.) Finally, the majority pointed out several ways in which the campaign finance system actually benefits challengers. (App. A26.)

The dissenting judge disagreed with virtually everything in the majority opinion. Initially, it was his view that the amendment to the expenditure limitation waiver required remand to the district court. (App. A31.) Nevertheless, since the majority reached the merits, the dissent gave its views also. The dissent expressed the belief that the law does infringe on First Amendment rights by creating a coercive system. (App. A32-A40.) The dissent viewed the expenditure limitation waiver not as a permissible inducement to participation, but a penalty imposed on a non-participating candidate's choice to forgo public subsidy and avoid spending limits. The dissent also disagreed with the majority's conclusions that

the challenged provisions are narrowly tailored to serve compelling state interests. (App. A40-A44.)

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the court of appeals is neither contrary to decisions of this Court nor those of any other court. Rather, the ruling is consonant with principles enunciated by this Court and with those few decisions that have addressed the constitutionality of public subsidy campaign finance laws. Moreover, although the general subjects of this case, First Amendment rights and campaign finance reform laws, are obviously significant, the analysis here turns on the very specific provisions of the state law at issue. A ruling by this Court would, therefore, provide little in the way of general guidance for other courts and legislatures.

I. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS OR ANY OTHER COURT.

This case does not present any conflict for the Court to resolve. To begin with, very few courts have addressed issues similar to those presented in this case, that is, whether a state campaign finance system that provides partial public funding to candidates in return for agreement to limit expenditures crosses the line from a permissible voluntary system to an impermissible coercive system that violates the First Amendment. The decision

in this case is fully consistent with the rulings in those few cases.

A. The Court Of Appeals Ruling That The Public Financing System Is Voluntary And Does Not Burden First Amendment Rights Is Consistent With Prior Cases.

Petitioner posits that the court of appeals decision is inconsistent with the principles established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). However, it was in *Buckley* that this Court enunciated the central premise on which the Minnesota law is founded: that the government can, consistent with the First Amendment, offer public campaign funding in return for agreement to limit campaign expenditures. *Id.* at 57, n.65. The Court applied that principle in upholding against a direct First Amendment attack the system of presidential public campaign funding conditioned on acceptance of spending limits. *See Republican National Committee v. Federal Election Commission*, 445 U.S. 955 (1980), *aff'g mem.*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court) ("*RNC*"). That general principle is not challenged by Petitioners.

Rather, Petitioners question the application of the principle to the particular elements of the Minnesota campaign financing system, arguing that the Minnesota law does not present candidates with the voluntary choice approved in *Buckley* and *RNC*, but instead coerces candidates into participating. They contend that the court of appeals' conclusion that the Minnesota system is voluntary and therefore does not burden First Amendment

rights conflicts with *Buckley* and "unconstitutional conditions" cases. However, as the three-judge court decision affirmed by this Court in *RNC* explained: " 'not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid.' " 487 F. Supp. at 285 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978)). That the court of appeals concluded that the particular mix of inducements contained in the Minnesota program does not rise to the level of impermissible coercion, and as a result does not infringe First Amendment rights, therefore presents no conflict with this Court's precedents.

Moreover, the decision below is consistent with those of other courts that have addressed similar challenges to state public funding/spending limit laws. The decision of the Eighth Circuit is fully consistent with the First Circuit's decision addressing a challenge to an analogous Rhode Island law. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). The discussion of *Vote Choice* in the decision below illustrates the harmony between the two decisions and makes extensive discussion here unnecessary. (App. A10-A12.) Suffice to say that the First Circuit upheld a state campaign finance law that provided partial public funding for gubernatorial candidates who agreed to an expenditure limit. The system released a participating candidate from the expenditure limit if his opponent spent or raised money in excess of the limit. In addition, the Rhode Island system provided higher limits for contributions to participating candidates than to those who did not participate. The law was challenged as a coercive imposition of spending limits in violation of candidates' First Amendment rights. The Eighth Circuit analyzed the

reasoning of the First Circuit and found it both persuasive and applicable in the case at bar.

In *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995), the district court denied a preliminary injunction in a case raising a similar challenge to a similar Kentucky law. Like the Minnesota law challenged here, the Kentucky law provided partial public campaign funding to candidates who agreed to expenditure limits. The law also provided for waiver of the expenditure limit for a participating candidate if a non-participating opponent received contributions or made expenditures in excess of the spending limit. The court held the plaintiff was not likely to succeed on his First Amendment challenge to the spending limit waiver. The court was:

> not convinced that [the waiver provision] impermissibly chills the speech of privately-financed candidates simply because it enables the speakers' adversaries to respond. It occurs to this court that the [waiver] provision promotes more speech, not less.

Id. at 928.

The Eighth Circuit decision is in synch with these rulings. Like the Rhode Island and Kentucky laws, Minnesota's system infringes no First Amendment rights. The Minnesota campaign finance law is a permissible voluntary program that establishes incentives for candidates to accept public funding coupled with expenditure limits.[12]

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[12] Much of Petitioners' "coercion" argument is premised on the claim that the challenged laws penalize a candidate's decision not to participate. Although the majority correctly

The court of appeals conclusion that the Minnesota system does not violate Petitioners' First Amendment rights is consistent with the pronouncements of this Court and others that have addressed similar issues.

Beyond the semantic debate whether the public funding/spending limit system is voluntary or coercive, actual experience under the law belies Petitioners' contention that the effect of the law is to force unwilling candidates to agree to expenditure limits that they would otherwise exceed. Common sense dictates that candidates who wanted to spend more but were forced to accept the limits would spend all that the law permits. However, as the record reflects, in 1992 the average campaign spending on both house and senate contests was barely more than half of the amount allowed by the statutory limits. See p. 3, *supra*. Obviously, for the average spending to be that low, few candidates could have spent up to the limits, belying any claim of pervasive coerced participation.[13]

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rejected this argument, it is nevertheless worth noting that it applies only to the expenditure limitation waiver. Other provisions challenged by Petitioners, such as the participating candidate's entitlement to the public subsidy and the contribution refund available to her contributors are not affected by the opponent's choice regarding participation.

[13] At oral argument before the Eighth Circuit, Petitioners claimed that the low average spending was the result of many incumbents running unopposed. Lest Petitioners again make that asertion in reply, the Court should be aware that it is both unsupported in the record and factually incorrect. In the 1992 elections there were only twelve unopposed legislative races out of 201. *See* Election Division, Minnesota Secretary of State, *The Minnesota Legislative Manual 1993-1995* at 362-77.

When it has been confronted with a state law that is coercive rather than voluntary, the Eighth Circuit has so ruled. In *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996), the court held that the spending limit provisions of Missouri's campaign finance laws were unconstitutional. The law provided that a candidate who did not agree to the spending limit could accept contributions from individuals, but not from PACs, political parties or other organizations, and those candidates were required to file daily disclosure reports once they exceeded the spending limits. Candidates who agreed to the limits were not subject to either the contribution restrictions or the daily disclosure requirement. *Id.* at 1424. The court held that this system imposed penalties rather than providing inducements, because rather than giving a participating candidate a benefit he would not otherwise enjoy, such as public funding, the system penalized non-participating candidates by taking away something they would otherwise be entitled to (the right to accept organizational contributions) and by imposing the additional task of daily disclosure. *Id.* at 1425. This system is obviously distinguishable from the Minnesota system that takes nothing away from non-participating candidates and only provides added benefits to participating candidates. The difference between the two systems and the appropriately different rulings in each case are a further indication that there is no reason for this Court to intercede.

B. The Court Of Appeals Alternative Ruling That The Challenged Laws Are Narrowly Tailored To Serve Compelling State Interests Does Not Conflict With Prior Cases.

The court of appeals decided further that even if there were some First Amendment burden imposed by the state campaign finance laws, they would survive strict scrutiny because they are narrowly tailored to serve well-recognized compelling state interests. (App. A17.) This ruling is also consistent with decisions of other courts, and would provide a basis for affirmance of the decision even if the Court disagreed with the lower court's first conclusion. Accordingly, the alternative holding provides an additional reason why the Court should not grant the petition.

Courts that have considered public funding/expenditure limit systems have uniformly acknowledged that reduction in the reliance on large contributions and the attendant risk of corruption or appearance of corruption and the increased opportunities for candidate communication in place of fund-raising are compelling state interests that are served by such systems. *E.g.*, *Buckley*, 424 U.S. at 91; *RNC*, 487 F. Supp. at 285; *Vote Choice*, 4 F.3d at 39. Those cases make it absolutely clear that a state can pursue these compelling state interests by conditioning receipt of public campaign funding on agreement to expenditure limits. Thus, the most fundamental elements of the Minnesota law, and the court of appeals decision upholding it, are consistent with prior decisions. The particular provisions challenged by Petitioners also fit into that construct.

The contribution refund provision is just part of the public funding mechanism. (App. A13.) The refund provision ties part of the subsidy to the candidate's popularity, as measured by the willingness of voters to contribute to her campaign, but that relationship is also consistent with earlier precedent. *See Bang v. Chase*, 442 F. Supp. 758, 766 (D. Minn. 1977) (three-judge court), *aff'd*, 436 U.S. 941 (1978) (Minnesota tax check-off system by party valid).

Petitioners' objection to the Eighth Circuit's approval of the expenditure limitation waiver is similarly meritless. The court of appeals explained how this provision serves the compelling interest of the state in encouraging participation in the system by removing a significant potential impediment to participation – the fear that a participating candidate will be grossly outspent by a non-participating candidate. The Eighth Circuit's decision that the expenditure limitation waiver is narrowly-tailored to serve the statute's compelling purposes is consistent with the alternative ruling of the court in *Wilkinson* concerning the Kentucky waiver. *Wilkinson*, 876 F. Supp. at 928 ("The provision prevents the publicly-funded candidate from being penalized for deciding to accept public funds.").

Moreover, in the district court Petitioners virtually conceded that this provision is necessary to a successful system. Referring to the provisions that free a participating candidate from the spending limit and allow her to retain the public subsidy when faced by a non-participating opponent, Petitioners acknowledged: "The legislature could reasonably have concluded that both of these features were *essential* to give the new system of spending limits a fair chance to succeed." Final Order, n.3, quoting

Plaintiffs' Mem. in Support of Mot. for Summary Judgment at 9 (emphasis added in district court quotation) (App. A53). Thus, there is no genuine disagreement that these provisions are necessary to serve the purposes of the law.

Petitioners also complain that by amending the law in 1996 to provide for the triggering of the expenditure limitation waiver by the spending or fund-raising of a non-participating candidate, the legislature was not serving legitimate purposes, but was protecting incumbent legislators against independent challenges. The Eighth Circuit saw this amendment for what it was: simply an attempt to close a loop-hole in the law that had not initially been perceived. (App. A25.) More to the point, Petitioners have no standing to challenge the impact of the amended law as it may affect the decisions of a non-major-party candidate, because they were both major-party candidates that the change in the law did not even arguably affect adversely.[14]

C. The Court Of Appeals Ruling That The Campaign Finance Law Does Not Unlawfully Discriminate Against Challengers Is Consistent With Established Legal Principles.

Finally, Petitioners fault the court of appeals for rejecting their argument that the Minnesota campaign

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[14] As to majory-party candidates, the amendment meant that instead of an automatic triggering of the expenditure limitation waiver by their non-participation, the waiver would not come into play unless and until they reached designated thresholds of contributions or spending. See p. 4, *supra*.

finance law unconstitutionally discriminates against challengers in favor of incumbents.[15] Once again, with this issue as well as the others, Petitioners have failed to identify any case with which the Eighth Circuit ruling is in direct conflict. Rather, the ruling is consistent with prior decisions of this Court.

First, in *Buckley* this Court rejected a challenge to contribution limits based on alleged discrimination against challengers and in favor of incumbents, explaining:

> [T]he Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes even-handed restrictions.

Buckley, 424 U.S. at 31. The Court rejected broad generalizations offered by plaintiffs, noting that the effect of a contribution ceiling could well vary depending on a number of factors. Here, Petitioners offer only broad generalizations attributing discriminatory motives to the

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[15] As Respondent pointed out in the court of appeals, neither of the Petitioners have standing to raise this claim that the law favors incumbents. Plaintiff Rosenstiel sought the opportunity to run against a long-time incumbent in the general election, but did not do so because he lost in the primary. Plaintiff Longley ran in the general election, but did not face an incumbent in his race.

Minnesota Legislature. The court of appeals found Petitioners' claims of discriminatory legislative intent unpersuasive and unsupported. (App. A25.)

Additionally, the three-judge court decision in *RNC* affirmed by this Court rejected the premise that public financing schemes must eliminate the inherent disadvantages faced by candidates challenging incumbents. The court explained:

> [R]egardless of whether a campaign is publicly or privately funded, it is inevitable that some candidates will have advantages over others. To require that public funding equalize these differences would distort its purpose, which is to facilitate political communication by providing an alternative to private funding with its burdens and unhealthy influences.

RNC, 487 F. Supp. at 287. The court of appeals properly applied this reasoning to the instant case. Indeed, the court explained several ways in which the Minnesota system can present challengers with advantages they would otherwise not enjoy, including a provision that gives first-time candidates an increased subsidy. (App. A26.)

In summary, Petitioners have identified no genuine conflict between the decision of the court of appeals here and any relevant decision of this Court or any other court. The decision below applies the correct legal standards and does so in a manner consistent with the rulings of other courts that have addressed similar challenges. There is no dispute among the courts for this Court to resolve and there is no deviation from this Court's precedent for the Court to correct.

II. CERTIORARI IS NOT WARRANTED BECAUSE THE IMPACT OF THE DECISION IS NARROW.

Beyond the fact that the decision below presents no conflict that requires resolution, there is an additional reason why the petition for certiorari should not be granted. This case does not present the kind of broad-reaching issues that warrant this Court's review.

First, Petitioners' argument is tied closely to the particular structure of the Minnesota system. As the foregoing section illustrates, there is no dispute about the general principles that apply to a constitutional challenge of this kind. Petitioners do not challenge the central tenet on which the Minnesota system is based: that a state can offer public campaign funding in return for a candidate's agreement to adhere to expenditure limitations. Rather, Petitioners' primary contention is that the challenged provisions of the Minnesota system take it beyond the realm of a permissible voluntary program and in fact coerce unwilling candidates to participate. Because the determination whether the system is voluntary or coercive is so tied to the particular provisions of the law, the decision below and any decision of this Court if the petition were granted would necessarily be of limited application to statutes that contain different provisions.

Furthermore, much of Petitioners' argument is premised on legislative history specific to the Minnesota laws. In this Court and below, Petitioners have based their argument on statements made by particular Minnesota legislators. (*E.g.*, Pet. 5, 10-11.) The court of appeals found these snippets of legislative history inapposite and unpersuasive. (App. A15, A25.) However, even if they

were germane, any decision dependent on those statements would have little bearing on the constitutionality of any other state's laws. Similarly, Petitioners argue based on the particulars of when specific provisions of the Minnesota law were enacted and what the rates of participation in the public funding program were at those times. (Pet. 22.) These additional factors, unique to the law challenged here, further limit the impact of the decision and counsel against granting the petition.

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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